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*Connecticut. Reports. Supreme Court of Errors.*  
**R E P O R T S**

OF

**C A S E S,**

**ARGUED AND DETERMINED**

IN THE

**Supreme Court of Errors,**

OF THE STATE OF

**CONNECTICUT,**

IN THE YEARS 1802, 1803, AND 1804.

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**BY THOMAS DAY,**

COUNSELLOR AT LAW.

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*JUDICIA.....in quibus non de facto,  
sed de ÆQUITATE, ac JURE, certetur.*

CICERO.

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**VOL. I.**

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**HARTFORD :**

**PRINTED BY HUDSON AND GOODWIN.**

**1806.**

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**DISTRICT OF CONNECTICUT, to wit:**

(L. S.) **BE IT REMEMBERED**, That on the thirty first day of July, in the thirty first year of the Independence of the United States of America, THOMAS DAY of the said District, hath deposited in this office the title of a Book, the right whereof he claims as proprietor, in the words following, to wit:

“Reports of Cases, argued and determined in the Supreme Court of Errors of the State of Connecticut, in the years 1802, 1803, and 1804. By Thomas Day, Counsellor at Law. Judicial.....in quibus non de facto, sed de aequitate, ac jure, certetur. Cicero. Vol. 1.”

In conformity to the act of the Congress of the United States, intitled, “An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned.”

HENRY W. EDWARDS,

Clerk of the District of Connecticut.

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## ADVERTISEMENT.

**T**HE original design of the reporter was, to publish the cases, decided by the Court of dernier resort in this State, in annual numbers, commencing with the year 1805. At that term he attended the Court, for the first time, to take minutes of the proceedings, with a view to publication. He was afterwards induced, by the advice of several gentlemen, whose opinions he highly respected, to extend his plan, so as to publish a volume, comprising the decisions of the three preceding years. In the prosecution of this plan, he has been particularly aided, by the notes of a distinguished member of the Court, by the briefs of some of the counsel, and by the minutes of a professional friend. He has also been indulged with free access to the records, from which the statements of the cases have been extracted, and the reasons of the Court transcribed. He makes this acknowledgment with pleasure, as well because justice requires it, as because it may reasonably excite an expectation of greater utility from the work, than his own unassisted labours could have effected.

# I R I F

## CASE 2: RITDZTID IN THE FIELD

1. The first step in the process is to identify the problem. This is done by observing the situation and asking questions. The next step is to analyze the problem and determine the cause. This is done by looking at the data and making a hypothesis. The final step is to implement a solution and evaluate the results.

2. The second step is to identify the problem. This is done by observing the situation and asking questions. The next step is to analyze the problem and determine the cause. This is done by looking at the data and making a hypothesis. The final step is to implement a solution and evaluate the results.

3. The third step is to identify the problem. This is done by observing the situation and asking questions. The next step is to analyze the problem and determine the cause. This is done by looking at the data and making a hypothesis. The final step is to implement a solution and evaluate the results.

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This is the first of a series of papers  
 which will be published in the near future  
 and will contain the results of the  
 first part of the investigation.



# *The Supreme Court of Errors,*

HOLDEN AT HARTFORD, IN JUNE, 1802,

CONSISTED OF

HIS EXCELLENCY JONATHAN TRUMBULL,  
GOVERNOR,

HIS HONOUR JOHN TREADWELL, LIEUTENANT-  
GOVERNOR,

HONOURABLE WILLIAM WILLIAMS,

HONOURABLE OLIVER ELLSWORTH,

HONOURABLE WILLIAM HILLHOUSE,

HONOURABLE JOSEPH P. COOKE,

HONOURABLE ROGER NEWBERRY,

HONOURABLE THOMAS SEYMOUR,

HONOURABLE AARON AUSTIN,

HONOURABLE DAVID DAGGETT,

HONOURABLE JONATHAN BRACE,

HONOURABLE NATHANIEL SMITH,

HONOURABLE JOHN ALLEN, and

HONOURABLE CHAUNCEY GOODRICH,

ASSISTANTS.

---

Tyler v. Marsh.

1802,

---

In the Court below,

SOLOMON MARSH, *Plaintiff*; OZIAS TYLER and JOSEPH  
CURTISS, *Defendants*.

**T**HIS was an action of *indebitatus assumpsit*.

The declaration stated, that one *Elisha Frost* appli-  
ed to the plaintiff, to purchase of him a number of

In an action on  
a written con-  
tract, for a  
sum certain,  
the contract it-  
self furnishes  
the rule of da-  
mages.

## CASES DETERMINED IN THE

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TYLER

v.

MARSH.

mules, upon a credit, and produced a writing in these words :

“ *Plymouth, June 1st, 1798.*

“ To Capt. *Solomon Marsh* of *Litchfield*.

“ SIR,—WHATEVER sum *Elisha Frost* shall give  
“ his notes of hand for, to you, we will hold ourselves  
“ obligated to pay, in case said *Frost* should not pay them  
“ to you, as long as he and you shall agree to have the  
“ said notes lie against said *Frost* ; as witness our hands,

“ *Ozias Tyler,*

“ *Joseph Curtiss.*”

The plaintiff, relying upon the responsibility of the defendants, thereupon sold mules to *Frost*, of the value of \$ 800, and took his two notes of hand, dated June 1st, 1798, each for \$ 296 66, with interest, one of them payable in one year from the date, the other on the 1st of January, 1799. By an agreement between the plaintiff and *Frost*, these notes were suffered to lie until on or about the 9th of November, 1799, when they were put in suit, and, on the second Tuesday of the December following, judgments were rendered on both of them ; on one, for \$ 325 93, debt, and \$ 4 17, costs of suit ; on the other, for \$ 324 8, debt, and \$ 4 17, costs of suit ; executions were taken out, and levied upon the body of *Frost* ; he was thereupon committed to gaol, and took the poor prisoner's oath. The price of the executions was 17 cents each, and the officer's fees on both, \$ 14 92. It was alleged, that *Frost* had paid nothing on the executions, and that there was due from him to the plaintiff, including costs and interest, \$ 700. After having averred notice to the defendants, and a demand of payment, the declaration concluded with raising an *assumpsit*. The sum demanded, as damages, was \$ 800.

*Non assumpsit* was pleaded, and issue joined to the Court. (a) On the trial, the defendants offered to prove, that, at the time when the notes became payable, and for a considerable period afterwards, *Frost* was abundantly able to pay the same, and that they might, with due diligence, have been collected, but that the plaintiff had been guilty of gross negligence. On an objection made to the admission of that evidence, it was rejected by the Court, and a bill of exceptions was thereupon filed by the defendants.

1802.

TYLER  
v.  
MARSH.

The Superior Court found for the plaintiff, with \$715 1, damages.

The rejection of the testimony offered by the defendants, was assigned as cause of error.

*Edwards*, (of New-Haven) *Daggett*, and *Allen*, for the plaintiffs in error, contended, 1. That the writing was only an engagement to be liable, so long as the notes were to run, by the terms of them ; and that, consequently, the evidence ought to have been admitted : 2. That *indebitatus assumpsit* would not lie, but that the action should have been on the writing ; (b) and that the promise set up was not created by law : 3. That the damages, found by the Court, were too great.

*Smith*, (of Woodbury) and *Hosmer*, for the defendant.

THE COURT coincided in opinion with the Superior Court, on the first point ; on the second, they gave no opinion ; but on the third, reversed the judgment.

(a) The Superior and County Courts are authorized, by Statute, to try issues in fact, when joined to the Court, by agreement of parties. *Stat. 27.*

(b) *Carew v. Bond*, 1 *Root* 269, and *White v. Woodruff*, 1 *Root* 309.

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—  
 TYLER  
 v.  
 MARSH.

The damages are too great. The contract is a written contract, for a sum certain, the principal and interest of the notes. It is presumed, that the costs on the judgments against *Frost*, on the notes, are included in the sum awarded for damages ; and although the excess is not very great, it is considered as being important, that the established rule, in respect to damages on written contracts, for a sum certain, should be strictly regarded.

## Baldwin v. Kellogg.

In the Court below,

JASON KELLOGG and MARTHA, his wife, suing in her right as administratrix on the estate of *Richard Sacket*, late of Arlington, in the State of Vermont, deceased, *Plaintiffs* ; ASAHEL BALDWIN, *Defendant*.

The property of A. being confiscated, under the acts, and by the courts of a foreign state, and a commissioner appointed to collect the debts due to his estate, payment to that commissioner of a note given by B. to A. in this State, before the confiscation, shall discharge B. from any further liability thereon.

**A**CTION on a promissory note, executed by the defendant, dated the 25th of March, 1776, for 80*l.* payable to said *Richard Sacket*, on the 1st of May, 1776, with interest.

To this action the defendant pleaded in bar, that in the year 1775, said *Sacket* removed into the State of Vermont, and there dwelt till his death, which happened in 1789 ; that in 1777, the said *Sacket*, by various acts of treason committed against the said State of Vermont, and the United States, by joining and assisting the armies of the King of Great-Britain, then carrying on an open war against the said State, and the United States, forfeited all his estate, real and personal, to said State of Vermont ; and that the government of said State appointed a court to declare such estate forfeited, and to secure the avails thereof to said State ; that, in pursuance thereof,

said *Sacket* was convicted of treason, his estate confiscated, and *John Fassett* of said State was authorized to administer upon said estate, and collect the debts due there-to, and pay over the same to the treasury of said State ; that, after this confiscation, the defendant, being utterly ignorant thereof, sent the amount of said note to his agent in said State, to pay over the same to said *Sacket* ; that his agent was called upon, by said court of confiscation, and payment of said note demanded ; and that there-upon, he paid the same to said *Fassett* ; that the said *Sacket*, during his life, acquiesced in said payment, and never demanded the payment of said note. The plea also averred, that this note was not inventoried, by the plaintiffs, as administrators, and that the said *Fassett* paid the amount thereof into the treasury of Vermont, and concluded with an allegation, that in manner aforesaid, the said note had been fully paid.

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BALDWIN  
v.  
KELLOGG

The plaintiffs, in their replication, set forth, at large, the various acts of the said State of Vermont, declaring the estate confiscated, and the receipt given by *Fassett*, for the amount of the note ; and then averred, that the said *Sacket* and the defendant, when said note was executed and delivered, were inhabitants of the State of Connecticut, and that the defendant had ever since remained such.

To this replication there was a demurrer, and joinder in demurrer.

The Superior Court adjudged the replication sufficient.

In the writ of error, the general error was assigned.

*Smith*, (of Woodbury) and *Ruggles*, for the plaintiff in error.

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*Allen and Gould*, for the defendants.BALDWIN  
v.  
KELLOGG.

It was argued, in support of the judgment of the Superior Court, that the law, as recited, did not warrant the act of confiscation passed; that the law was *ex post facto*, it being enacted after the offence committed; that the conviction was irregular and void, because it appears, on the face of it, that the court condemned the said *Sacket* on the ground of the "several proofs that were exhibited in court, and that *otherwise* appear;" and because it is said, in the sentence, that he, with others, have forfeited their estates, "by the *notorious* acts committed against this, and the United States"; and that *Sacket* was not cited to appear and defend, and, therefore, could not be legally convicted. It was also urged, that Vermont is a foreign jurisdiction; that the law in question is a penal law; and that the penal laws of one country or state cannot be enforced in another. If *Fassett* had sued the plaintiff in error here, for the note, he must have failed. The note having been due from a citizen of the State of Connecticut, where the debt was contracted, was forfeitable only to this State, and, therefore, the law of the State of Vermont did not, and could not, reach it.

It was contended, that if the plaintiff in error, or his property, had been taken in Vermont, payment would have there been enforced against him, and, in that case, he would have been discharged from the note.

For the plaintiff in error it was argued, that although there are irregularities upon the face of the laws and proceedings of Vermont, yet they are the acts of an independent government, and the judgment of a foreign court, and, therefore, to be respected; that the debt fol-

lowed the person, and was, therefore, in *Sacket*, in Vermont, and, consequently, property, which that State might confiscate. When this act was passed in Vermont, there was no law of this State on the subject ; and whether the law was penal or not, is very immaterial, as it was passed by an independent State, by the recommendation of Congress, in consequence of the then existing state of things. The laws of the several States, confiscating the property of its citizens, were of a peculiar nature, and have been deemed valid, even in the courts of the nation, with whom the United States were then at war. The plaintiff in error honestly paid his money to the commissioner under this law, who was authorized to receive it ; and having so paid it, and this payment being so long acquiesced in, it would be unjust to compel him to pay it again.

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It was also urged, that in England, the courts consider the bankrupt laws of a foreign country as operating every where, though penal in their nature.(a)

The judgment was reversed, unanimously, HILLHOUSE and AUSTIN, *Asts.* being absent.

BY THE COURT. The legislature of Vermont had power to pass the law in question, and to constitute such tribunal as they deemed proper, to enforce it. It is unnecessary to enquire, whether the act in question, or the proceedings thereon, were such as propriety required. They are the acts of a legislature and of a court of a foreign state, and, as such, to be respected. It is not necessary to decide, whether the commissioner on this estate could have compelled the payment of the note, before our courts ; or, whether this debt was, strictly speaking, prop-

(a) *Sill v. Worwick*, 1 H. Bl. 665.

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erty in Vermont, or property in Connecticut. By the proceedings before us, it is clear, that all the property of *Sacket* was confiscated; his rights of action were, of course, transferred to the State of Vermont, and vested in *Fassett*, their agent. *Fassett* then might lawfully receive the money; and being thus authorized, *Baldwin*, in paying it to him, ought to be justified. If the person or property of the defendant below had been taken in Vermont, payment might have been enforced; and it is right, therefore, that his discharging himself from a legal demand should be validated. The contrary doctrine would oblige *Baldwin* to suffer this note to remain against him, accumulating interest, till *Fassett's* power to receive the debt had expired; for *Baldwin* could not safely pay it in Vermont to *Sacket*, pending *Fassett's* administration. It is not to be presumed, that the law will subject a debtor to such an embarrassment, as to compel him to let the debt remain uncanceled, and on interest; nor is it proper that the creditor, and his administrators standing in his place, should now allege these objections, when the laws of the State where he belonged, and his own conduct, have produced the evil.

## Spalding v. Huntington.

In the Court below,

SOLOMON HUNTINGTON, Jun. and ANNA, his wife, late  
*Anna Jones, Plaintiffs; JOHN SPALDING, Defendant.*

The intent of the testator to give a fee-simple to A. being apparent on the face of the will, evidence dehors the will is inadmissible, to shew a different intent.

**A**CTION of ejectment, demanding the seizin and possession of a piece of land, lying in New-Haven, containing three acres, purchased by *Timothy Jones*, late of New-Haven, deceased, of *John Payne*. Said *Anna* claimed as sole heir at law of *William Jones*, son of said



*Timothy*. The defendant claimed under a title from *Isaac Jones*, Jun. first grand-son of said *Timothy*, by the name of *Jones*.

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SPALDING  
v.  
HUNTING-  
TON.

The question arose on the following clause in the will of said *Timothy*: "I will to *William Jones* three acres of land I bought of *John Payne*, [the lot in question] and four acres in my pasture; [with several other pieces] also, my house, and home-lot, and barn, and the lot I bought of *Enos Alling*, after his mother shall have done with it, shall be *William*, during his life, and after, to his son; but if he should have no son, then it shall be the first son bearing the name of *Jones*, his forever, if my grand-son."

The plea of the defendant, after reciting the will, set forth certain facts, as explanatory of the testator's intent, the principal of which was, that said *William Jones* was a bankrupt, and known to be such to the devisor, and that, therefore, it was not to be presumed, that he meant to give an estate to go to the creditors of *William*.

The pleadings terminated in a demurrer; and judgment was for the plaintiffs.

The general error was assigned.

*Daggett* and *W. Hillhouse*, for the plaintiff in error, contended, that a life-estate only was given, by the will, to *William Jones*, in the demanded premises. They also urged, that as the phrase in the will was doubtful, it was proper to resort to circumstances *dehors* the will, to explain the intent of the testator. In support of the last

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TON.

position, the authorities cited in the margin were relied on. (a)

*Baldwin* and *Smith*, (of New-Haven) for the defendants in error, claimed, that as to the land in question, the will vested a fee-simple in *William*; and that the limitation in the clause respected only the house, &c. and not the former pieces of land.

THE COURT decided, that the interest of the testator, apparent on the face of the will, was to give a fee-simple to *William* in the land in question; and, therefore,

Affirmed the judgment.

(a) 3 *Keble* 49.

3 *Burr.* 1898, *Oates and Wigfall v. Brydon.*

6 *Rep.* 16, *Collier's case.*

2 *Ld. Raym.* 831, *Cole v. Rawlinson.*

1 *Bro. Ch. Ca.* 472, *Fonnereau v. Byntz.*

*Goldsb.* 99.

*Prec. Ch.* 71, *Cooper v. Williams.*

*Pow. on Decv.* 518.

## Dickinson v. Harrison.

In the Court below,

SOLOMON HARRISON, and SUSANNAH, his wife, *Plaintiffs*;  
SYLVANUS DICKINSON, *Defendants.*

IN *indebitatus assumpsit* for money had and received, plaintiff may declare generally.

ACTION of *indebitatus assumpsit*, declaring, that on the 2d of October, 1795, the defendant was indebted to the said *Susannah*, then a feme sole, but since married to the said *Solomon*, in the sum of \$120, for so much money, before that time, had and received of one *Bristol*, to and for the use of the said *Susannah*, being the avails of certain lands, which she conveyed to the defendant, on

the 24th of March, 1794, and which he sold to said *Bristol*, and received payment therefore, previous to, and on, said 2d of October, 1795. The declaration concluded, by raising an *assumpsit*, in common form.

1802.

DICKINSON  
v.  
HARRISON.

The general issue was pleaded, and closed to the Court. Judgment, that the defendant did assume, and damages assessed.

Error assigned, that the declaration was insufficient.

*Ingersoll* and *Staples*, for the plaintiff in error, urged, that the declaration was too general ; and, that it did not appear, by the special circumstances stated, but that the defendant below had a right to retain the money.

*Daggett* and *W. Hillhouse*, for the defendants in error.

BY THE WHOLE COURT,

The judgment was affirmed.

## Sterry v. Robinson.

In the Court below,

WILLIAM ROBINSON and SYLVESTER ROBINSON, *Plaintiffs* ; STEPHEN STERRY, *Defendant*.

**A**CTION of *assumpsit*, on a bill of exchange.

The declaration stated, that the defendant, at the Island of St. Vincents, in the West-Indies, drew a bill of exchange directed to *Josiah Raymond*, meaning *Joshua*

the bill, of the christian name of the drawee, is immaterial, if the bill be presented to the right person.

If a bill of exchange is not accepted, an action will lie upon it, against the drawer, before the time when it is payable.

A mistake, in

1802.

STERRY

v.

ROBINSON.

*Raymond*, and therein and thereby requested said *Josiah*, alias *Joshua*, *Raymond*, at thirty days sight, to pay the contents of said bill to *Claude Alexander*, or his order; which bill, having been endorsed to the plaintiffs, they caused to be presented to said *Josiah*, alias *Joshua*, *Raymond*, for his acceptance, who refused to accept the same. There was a protest for non-acceptance, and notice given to the defendant. Before the expiration of the thirty days, this action was brought against the defendant, as drawer, to recover the amount of the bill, with costs of protest, and ten per cent. damages.

To this declaration there was a demurrer.

Judgment, by the Superior Court, that the declaration was sufficient.

*Ingersoll*, for the plaintiff in error, urged, that the bill was directed to *Josiah Raymond*, and presented to *Joshua Raymond*; that these were different names; and that, of course, the presentment was of no effect. He also contended, that the action could not be instituted, till the bill, by the terms of it, fell due. The contract between the parties was, that at a certain period after sight, the bill should be paid. The contract, then, was not broken, until that period had elapsed, and a demand of payment, and refusal, had taken place. Suppose judgment should be rendered for full damages, and afterwards the bill should be paid. This would be a great hardship on the drawer.

*Dwight*, for the defendants in error, contended, that as the bill was presented to the right person, and by him refused to be accepted, and was protested for such non-acceptance, the mistake of the christian name in the bill

was immaterial. As to the time's not being elapsed, he urged, that the contract of the drawer of the bill was, that the drawee should accept it according to its tenor ; and that, if he did not, an action *immediately* accrued to the holder. The case of *Milford v. Mayor* (a) he cited, as full to this point. If the drawer is liable for the bill, he must also be liable for costs of protest and damages, which are consequences of the non-acceptance.(b)

1802.

STERRY  
v.  
ROBINSON.

BY THE WHOLE COURT,

The judgment was affirmed.

(a) *Doug.* 55. See also *Chitty* 64.—*Kyd* 70.—*Bull. N. P.* 269.

(b) 2 *H. Bl.* 378, *Mellish v. Simeon*.

## Magill v. Casey.

In the Court below,

JAMES CASEY, *Plaintiff*; ARTHUR MAGILL and STEPHEN CLAY, *Defendants*.

THE declaration stated, that *Casey* prayed out a writ of attachment against *Thomas Leverett*, and attached his goods ; that *Magill & Clay* procured a writ of replevin to issue, in the name of *Leverett*, and connected therewith an action of trespass against *Casey*, in their favor, in which they alleged the goods to be their property ; that they gave bond thereon to satisfy such damages as the adverse party should recover against *them* ; that the sheriff, by the direction of *Magill & Clay*, took the goods, on the writ of replevin, out of the custody of the law, and delivered them to *Leverett*, whereby *Casey's* lien upon them was destroyed ; that *Magill & Clay* pursued their action to trial ; that the only question in the case

Former action on a replevin bond, which was adjudged void, no bar to an action on the case, for taking goods, which plaintiff had attached, out of the custody of the law, thereby destroying his lien, and defeating him of recovering his debt.

1802.

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v.  
CASEY.

was, whether the goods, when attached, were their property, or *Leverett's*; and, that a verdict was found, and judgment rendered, against them: That *Casey's* action against *Leverett* proceeded to final judgment; that execution issued; and that a *non est inventus* was returned.

To this declaration there was a plea in bar, that *Casey* had previously brought an action of debt on the bond against *Magill & Clay*; that on trial to the jury, on the general issue, the former proceedings, which were set forth at large, was the only evidence adduced; that there was a demurrer to this evidence, and the jury discharged; and, that the Superior Court adjudged, [on the ground that the bond was void] that the evidence was insufficient to maintain the issue, and final judgment was rendered accordingly.

To this plea there was a demurrer; and judgment, that the plea was insufficient.

The general error was assigned.

*Huntington*, (of Middletown) for the plaintiffs in error, contended, that every fact appeared on the former declaration, which appears on this; and that, if the plaintiff had merits, the Court would have adjudged to him his damages, in that action.

*Daggett and Russell*, for the defendant in error, urged, that in the former suit, the replevin bond was treated as of force, and the action was debt; that no averment was made, that *Magill & Clay* did any act, except give the bond; that, in this declaration, it was averred, that *Magill & Clay* had procured the writ of replevin to issue,

and directed the sheriff to take the goods out of the custody of the law, which had destroyed the plaintiff's lien, and defeated him of recovering his debt.

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v.  
CASEY.

BY THE COURT, three *Judges* dissenting,  
The judgment was affirmed.

## Bisco v. Bishop.

In the Court below,

SAMUEL BISHOP, *Esq.* Judge of Probate for New-Haven District, *Plaintiff*; ISAAC BISCO, *Defendant*.

**A**CTION of debt, on the penal part of of a probate bond, given by the defendant, as executor of the last will and testament of *Samuel Bisco*, deceased.

Heirs may have a remedy, on the probate bond, against the executor, for making a fraudulent inventory and sale of lands.

Plea of a general performance, after setting out the condition.

Replication, alleging, that the defendant had inventoried three pieces of land as containing a certain quantity, and as of a certain value, whereas they contained a far greater number of acres, and were of greater value; that the inventories were returned to the Judge of Probate, the plaintiff, and accepted, and ordered for record; that the defendant obtained an order for the sale of about 400*l.* worth of land to pay debts; that, by collusion with *Daniel and Lamberton Tolles*, he sold said three pieces of land, at the inventory price and admeasurement, and returned an account of sales to said Judge; and that this was all done to defraud the heirs, viz. *Betsey Bisco*, about thirteen, and *Samuel Bisco*, about ten years of age,

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—  
BISCO  
v.  
BISHOP.

who were pursuing this action, in the name of the Judge, for their benefit.

The rejoinder of the defendant traversed the facts stated in the replication.

The jury found for the plaintiff, and assessed damages for the value of the land, fraudulently withheld from the inventory, and sold at a price below its value.

The errors assigned were, 1. That it appertains, exclusively, to the Court of Probate, to determine the matters in controversy, in this case: 2. That the heirs may now have their remedy by appeal from Probate.

*Edwards*, (of New-Haven) and *Daggett*, for the plaintiff in error, argued, that by the judgment of the Superior Court, the settlement of the estate of the deceased is taken from the Court of Probate, to which by law it belongs, and transferred to the courts of common law; that there is an adequate remedy in the Court of Probate, by appeal; and that the heirs may now, or at any time within eight or ten years, (as they are both under thirteen years of age,) take such appeal; or they may bring ejectment, and recover on the facts found, as it appears therefrom, that the executor and the purchasers were equally concerned in the fraud. They contended, that this proceeding was erroneous, as it would destroy a judgment of the Court of Probate, legally made, whereas it could be done away by appeal only, that being the method pointed out by statute.

*Baldwin* and *Smith*, (of New-Haven) for the defendant in error, argued, that this was a direct breach of the condition of the bond, by which the obligor engaged to



make a true and perfect inventory of the estate of the deceased ; that the heirs might have this remedy, or they might appeal ; that they were concurrent ; that the quantum of damages could not be looked at, by the Court, as the jury might have good reasons for giving that sum as smart money.

1802.

BISCO

v.

BISHOP.

BY THE COURT,

The judgment was affirmed.

## Allen v. Holkins.

In the Court below,

SAMUEL HOLKINS, *Plaintiff*; JONATHAN ALLEN, *Defendant*.

**A**CTION of trespass *quare clausum fregit*. Plea, not guilty.

A lease for fifteen years, though not acknowledged, is admissible to shew, that the party was in possession of the land, claiming title. A person is not a competent witness to impeach a writing, which he has subscribed.

On trial to the jury, the plaintiff offered in evidence a lease for fifteen years, from *Abel Mumford*, of the land in question, dated in 1796, which was duly signed, sealed, witnessed, and recorded ; but had not been acknowledged. The defendant claimed under a deed and lease from the said *Mumford*, dated in 1797. The plaintiff was in possession from the date of his lease, till the action was brought. The defendant offered *Mumford* as a witness, to prove, that the lease to the plaintiff was void, being intended only as a lease for a year. The lease was objected to, on one side, and the evidence of *Mumford*, on the other. The Court admitted the former, and rejected the latter. Verdict being for the plaintiff, the defendant filed a bill of exceptions.

1802. The matters contained in the bill of exceptions were assigned for error.

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v.  
HOLKINS.

*Huntington*, (of Suffield) and *Bradley*, for the plaintiff in error, contended, that the lease to *Holkins* was absolutely void, not being acknowledged agreeably to the requisitions of the statute ; that *Mumford* was a competent witness to prove, that his lease to *Holkins* was void ; and that the rule, which excludes witnesses from testifying to destroy instruments, which they have executed, extends only to negotiable paper, and, even in that instance, is denied in *Jordaine v. Lashbrooke*.(a)

*Terry*, for the defendant in error, argued, that the possession of *Holkins* was sufficient to enable him to maintain trespass ; that the lease might well be admitted to shew, that *Holkins* was in, claiming title ; and that he being in, claiming title, the subsequent lease and deed to *Allen* were void, under our statute.(c) It is of no consequence whether the title, by the lease, be valid, or not. It proves that *Holkins* claimed adversely to *Mumford* ; and, therefore, the subsequent conveyances were void.

He also contended, that *Mumford* could not testify to defeat his own deed ; and, that he was directly interested to establish a title in himself.

THE COURT affirmed the judgment, unanimously. Several of the *Judges* expressed a decided opinion, that the rule laid down, by Lord MANSFIELD, in *Walton v. Shelly*, (b) that no man should be admitted to swear

(a) 7 Term Rep. 601.

(b) 1 Term Rep. 296.

(c) Stat. 266.

against his own deed, was sound law, and ought to be adhered to. (d)

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HOLKINS.

(d) See *Hart v. M'Intosh*, 1 *Esp. Rep.* 289. To *assumpsit* by the indorsee of a promissory note, against the maker, the defence was illegality in the consideration, and the indorser was called to prove it. His evidence was objected to, on the ground, that it came within the rule in *Walton v. Shelly*. It was answered, that the court of King's Bench had now adopted a contrary rule. BULLER, J. before whom the case was tried, asked, if the last mentioned rule had ever been adopted in the Common Pleas? and being answered in the negative, he said he would adhere to the rule laid down by LORD MANSFIELD; and he accordingly rejected the evidence of the witness. *Le Blanc*, Serjt. said, that EYRE, Ch. J. had been of opinion, that the testimony of a witness under such circumstances was inadmissible.

The case of *Jordaine v. Lashbrooke* was decided in the King's Bench, after Justice BULLER had resigned his seat in that Court, and was appointed one of the Judges of the Common Pleas.

## Perrin v. Sikes.

In the Court below,

REUBEN SIKES, *Plaintiff*; THOMAS PERRIN, EZRA CLAPP, ROWLAND WELLER, and JOHN MATHER, *Defendants*.

THIS was an action of debt, in favour of the plaintiff as a common informer, to recover a penalty incurred by the defendants, in running a stage "on the post-road "from Hartford leading to Boston, through the northern "part of the town of Hartford, the town of Windsor, "and a great part of the town of Suffield," in violation of a grant made by the General Assembly to the plaintiff,

This Court will make no order touching the records of another Court.

In an action of debt, to recover double the value of a specific article, as a penalty, by statute, plaintiff may recover a less sum than he demanded.

A grant, by the General Assembly, of an exclusive privilege, with a penalty, to a common informer, against any one who should violate it, to forfeit a specific article, or double the value thereof, is valid.

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v.  
SIKES.

for the exclusive privilege of carrying passengers, by the stage, "on the post-road leading to Boston as far as the "Massachusetts line," during the pleasure of the Assembly. The grant declared, that whosoever should set up and drive a stage, for the purpose of carrying passengers, on the same road, should forfeit his stage and horses, "or double the value thereof." The declaration stated, that the defendants' stage and horses were of the value of \$ 700, and demanded \$ 1400 as the penalty.

On the plea of owe nothing, the jury found for the plaintiff, with \$ 692 damages.

The defendants moved in arrest of judgment, that the declaration was insufficient; and, that the verdict was for a less sum than the demand. The declaration was adjudged sufficient, and the motion in arrest insufficient.

On inspecting the record, it appeared, that the Clerk of the Superior Court had, by mistake, entered up judgment against one of the defendants, by the name of *Rowland Miller*, whereas he was described in the original writ, by the name of *Rowland Weller*.

*Edwards*, (of New-Haven) and *Huntington*, (of Suffolk) for the defendant in error, moved the Court, to permit the Clerk of the Superior Court to amend his record.

*Dwight* and *Terry*, for the plaintiffs in error, opposed the motion, on the ground, that this Court could not interpose, even to give permission respecting the records of another court.

THE COURT denied the motion.

*The Counsel* for the defendants, having procured the Clerk of the Superior Court to amend his record in the particular specified, moved, that the writ of error here might be made conformable to the record of the Court below, as now produced by the Clerk ; which was allowed, and done accordingly.

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On the merits of the writ of error, the *Counsel* for the plaintiffs urged, 1. That as they had set up a stage to run to Westfield and Albany, through part of Suffield, it was not a violation of *Sikes's* grant, as that contemplated only a stage going to Boston : 2. That a less sum was given than demanded, which was error in an action of debt : 3. That the grant was void, the penalty being the horses and carriages, OR *double the value thereof*.

For the defendant in error it was urged, that the spirit of the grant was, that he should enjoy the exclusive right to transport passengers to the Massachusetts line ; and that if the defendants below would set up a stage interfering therewith, they ought to obtain permission of the General Assembly ; that in such an action of debt as this the plaintiff may recover less than the sum demanded ; and that the grant was such as the General Assembly thought proper to make, and the Court could not say it was void.

BY THE WHOLE COURT,

The judgment was affirmed.

1802.

## Wise v. Wilcox.

In the Court below,

SYLVANUS WILCOX, *Plaintiff*; SAMUEL P. WISE and  
ENOS G. NETTLETON, *Defendants*.

**A**CTION on the case, charging the defendants with fraudulently and deceitfully affirming to the plaintiff, that one *Hawley*, who was then negotiating a bargain with the plaintiff for a horse, was a man of property and responsibility, whereas they knew him to be a bankrupt; that the plaintiff sold the horse, and took *Hawley's* note for the same, in consequence of their false affirmations; that they shared the property among them; that the note had never been paid, and that *Hawley* was utterly unable to pay any part of it, and always had been.

In an action by A. against B. for falsely and deceitfully affirming C. to be a man of property, by which A. was induced to trust C. and take his note, C. is a competent witness for A. to prove the facts, tho' the note be unpaid.

On trial to the jury, on the general issue, *Hawley* was offered, by the plaintiffs, as a witness to all the facts stated in the declaration. An objection was taken, that he was interested; for that if he procured a recovery, in this case, the note would be discharged. The Superior Court overruled the objection, and admitted the witness. A bill of exceptions was filed. Verdict for the plaintiff.

On this bill of exceptions this writ of error was brought. The general error was assigned.

*Edwards*, (of New-Haven) and *Smith*, (of New-Haven) for the plaintiffs in error, insisted, that if the plaintiff below recovered his whole damages from the defendants, *Hawley's* note might be deemed paid, upon the principle, that a person can receive no more than one satisfaction for an injury; that if the note had been paid, this action could not have been supported; and, therefore,

that the witness offered was directly interested, and, of course, incompetent.

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*Daggett*, for the defendant, insisted, that a recovery against the defendants below would be no bar to a recovery on the note ; that no plea could be formed, to an action on the note which would not be insufficient, having for its basis a recovery against others for a tort ; that the contract would still subsist against *Hawley* ; that if *Hawley* had given no note, and the defendants below had been on trial, he clearly might have testified, yet, in that case, he might be deemed as testifying to procure a judgment to exonerate himself ; that parties in a swindling transaction were constantly admitted as witnesses, and that even *participes criminis* often were witnesses to procure convictions for the highest offences ; and that, if there was any objection to the witness, it only went to his credit, and not to his competency.

BY THE COURT, SEYMOUR, *Ast.* dissenting,

The judgment was affirmed.

## Northrop v. Speary.

In the Court below,

JOHN SPEARY, *Plaintiff* ; JOEL NORTHROP, *Defendant*.

THE plaintiff declared in *assumpsit*, on the following facts : That on the 19th day of June, 1799, he sold to the Defendant a certain piece of land, and gave his deed therefore, describing it by metes and bounds, and con-  
 for the same, that if the land, on admeasurement, should exceed a certain estimated quantity, the purchaser should pay the seller an additional sum therefore, cannot be proved by parol evidence.

An agreement, made at the time of a sale and conveyance of land, the seller taking the purchaser's note

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SPEARY.

taining 42 acres, 2 quarters, and 21 rods ; that the parties agreed, that such being the quantity of the land, the defendant should pay to the plaintiff a certain price therefore, which, upon the execution of said deed, he accordingly paid ; that it was, at the same time, further agreed, that if said land, on admeasurement, contained more than said quantity, the defendant should pay to the plaintiff, for such excess, a sum in the same proportion to the purchase money, as the excess to the estimated quantity, and if it contained less than said quantity, the plaintiff should refund to the defendant a like proportional sum, for such deficiency ; that said land was afterwards measured, and found to contain 6 acres, 2 quarters, and 19 rods more than was contemplated ; and, that the value of such excess, by the rule agreed upon, amounted to \$170.

On the trial of this case to the jury, on the general issue, the plaintiff produced in evidence his deed to the defendant, which, being in the usual form, contained an acknowledgment, that the consideration, to the amount of the purchase money, had been received, to the full satisfaction of the plaintiff. He also admitted, before the Court and jury, that at the time of his executing said deed, the defendant gave his promissory note, in common form, payable at a time then future, to the amount of the consideration mentioned in the deed. The plaintiff then offered to prove the agreement, stated in the declaration, by parol testimony. This was objected to ; but the objection was overruled, and the witnesses admitted. To this judgment a bill of exceptions was taken. The jury found for the plaintiff, and assessed the damages.

On this bill of exceptions the case came before this Court.



*Smith*, (of Woodbury) and *Ruggles*, for the plaintiff in error, made three points in this case :

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1. This promise is within the statute of frauds and perjuries ; and in support hereof *Haynes v. Hare*, (a) *Preston v. Merceau*, (b) and *Bradley v. Blodget*, (c) were read.

2. The acknowledgment in the deed, by the grantor, that he had received payment to his full satisfaction, precludes him from making the claim in the declaration.

3. The contract set up in the declaration is merged in the deed and note. Here it was urged, that if the plaintiff could recover, on the ground of there being an excess of land beyond the estimated quantity, the defendant could, on the same principle, have recovered, if there had been a deficiency, and that recovery would have operated to destroy the note, or to make a defalcation from it, which cannot be done, by parol agreement made at its creation. The case of *Atwood v. Carr*, decided by the Superior Court, at Litchfield, August term, 1800, was cited as in point. It was also said, that the deed and note, in the present case, should be deemed to embrace the whole agreement, made at the same time ; and the principle, that no parol testimony should be introduced to curtail, vary, or enlarge a written security, should operate on this contract.

*Allen*, for the defendant in error, in answer to the first position of the plaintiff's Counsel, contended, that the statute of frauds and perjuries did not touch the case, this not being a contract for the sale of lands, or any interest in them.

(a) 1 H. Bl. 659. (b) 2 W. Bla. 1249. (c) Kir. 22

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2. As to the acknowledgement in the deed, it was said to be mere matter of form, and did not work the effect contended for; or, at most, it was only evidence of the plaintiff's having received a valuable consideration for the land, so as to prevent its being considered as a resulting trust.

3. The deed and note were not the evidence of the contract. The purpose of the one was to convey the title, and of the other to secure the payment of the purchase money. This contract was distinct and independent of these instruments, and might be carried into effect, without violating any principle of law. In support of these ideas, and also that the statute did not vitiate the contract, *Mott v. Hurd* (d) was cited, and relied on, and although it is difficult to see how the question could come up, in that case, or in the case of *Gillet v. Burr* there cited, yet it appears, that the Superior Court adopted the same principle there, as in this case.

The judgment was reversed, TREADWELL, *Lt. Gov.* WILLIAMS and NEWBERRY, *Asts.* dissenting. HILLHOUSE and AUSTIN, *Asts.* being absent, and SMITH and ALLEN, *Asts.* having argued the case, did not act.

BY THE COURT. The contract, stated in the declaration, was but one, entire contract, made at time of the sale and conveyance of the land, the whole of which is to be considered as included in the deed and note.

If parol testimony be admissible to establish the claim of the plaintiff below, on account of an excess of land, on the same principle, it must have been admitted, had

the land fallen short of the estimate made at the time of the sale and conveyance, on a claim of reduction from the sum secured by the note. The effect of such construction and practice, would be the destruction of all written contracts.

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v.  
SPEARY.

## Gleason v. Chester.

In the Court below,

CHAUNCEY GLEASON, ELIJAH COWLES, SETH COWLES, JONATHAN COWLES, GAD COWLES, and MARTIN COWLES, *Plaintiffs*; STEPHEN CHESTER, Sheriff of the County of Hartford, *Defendant*.

**A**CTION on the case, for the escape of a prisoner. A general verdict was found for the plaintiffs; and, on motion in arrest, the declaration was adjudged insufficient. A writ of error was brought to this Court, the judgment reversed, and the cause remanded to the Superior Court, to be proceeded in according to law. Before the Superior Court, the plaintiffs moved for a judgment on that verdict. The Court denied the motion, and ordered a repleader.

Writ of error brought upon an interlocutory judgment, before final judgment, will be abated.

This writ of error was brought to reverse that judgment on the motion. An abatement was pleaded, that no final judgment had been rendered.

BY THE WHOLE COURT,

The writ of error was abated.(a)

(a) *Vide post.*

1802.

## Wadsworth v. Woodford.

In the Court below,

HEZEKIAH WADSWORTH, SETH WADSWORTH, LUKE WADSWORTH, EPHRAIM WEBSTER, and WILLIAM BIDWELL, *Plaintiffs*; BISSELL WOODFORD, *Defendant*.

**A**CTION of trespass *quare clausum fregit*.

A plea in abatement, that other persons ought to have been joined as plaintiffs in the writ, should set forth particularly who those persons are, and describe them, so as to enable the plaintiff to make a better writ.

The defendant pleaded in abatement, that the plaintiffs were not the sole proprietors of the land described in the declaration; that the whole lot consisted of 25 1-2 acres, of which the plaintiffs owned but 19 acres, 3 quarters, and 32 1-2 rods, in common with other proprietors; and that the residue was owned by *Gideon Griswold* and his assigns, by *Elishama Porter* and his assigns, by the heirs of the wife of *John Wadsworth*, by the heirs of the wife of *Hezekiah Lee*, and by the heirs of the wife of *John Ashman*, none of whom were joined as plaintiffs in said suit.

To this plea there was a special demurrer, assigning for cause, that the defendant, in his plea, hath not described any, or either, of the heirs mentioned, nor any person, by name, or place of abode, who, the defendant says, should by law have been joined as plaintiffs in the suit.

Judgment, that the plea in abatement was sufficient.

The general error was assigned.

*Ingersoll*, for the plaintiff in error.

*Pitkin*, for the defendant.

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WADSWORTH  
v.  
WOODFORD.

The judgment was reversed, unanimously.

BY THE COURT. A plea in abatement ought to be with precise and strict exactness. (a) If the defendant plead a plea in abatement, he ought, generally, to give the plaintiff a better writ; or, in other words, he ought so to shew the mistake, or defect, that, on the face of the plea, the plaintiff may discover what will make a good writ. But, if the plea goes to the matter and substance of the writ, the defendant need not give a better writ.

If the plea on this record be considered good, it allows the defendant to shew a bad writ, and exonerates him from the obligation to give the plaintiff a better; unless the plaintiffs, in this cause, may, in their next writ, describe the co-plaintiffs in the manner, in which they are described in the plea; which we apprehend will not be allowed: Or, it imposes on the plaintiffs the necessity of conjecturing the persons, and places of abode, and of travelling over the country, as the case may be, in various directions, to enquire into what may, or may not, be the facts, relative to the *assigns*, in one class of persons, and the *heirs*, in the other. (b) The inconveniences, attending this mode of pleading, are great and numerous; while the rule, which requires exactness, precision, and the defendant to give a good

(a) *Lut.* 15. 1 *Com.* 65.

(b) It is a novel idea, that it is sufficient for a defendant to plead in such a manner, as to enable the plaintiff, upon *enquiry*, and *diligent industry*, to form a better writ. The objects of such enquiry and industry are to be averred as distinctly, by the pleader, in such a case, as in any other, or his plea is, as in all others, defective.

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writ to the plaintiff, produces no evil, and is always in the power of the defendant to regard and obey.

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It may, also, be observed, that no issue could be so joined on the averments in the plea, as to help out the defects, or enable the plaintiffs to meet the evidence in their support.

Neither the nature of the case, nor the circumstances disclosed on the record, appear sufficient to constitute an exception to the general rule, that a plea of *other parceners, not joined in the suit*, must contain such a description of them, as both to enable the plaintiff to meet the allegation, and to make a better writ. And we apprehend, that our practice, in all analagous cases, would be shaken, by a contrary determination.

### Eastman v. Chapman.

In the Court below,

DAVID CHAPMAN, *Plaintiff*; MARY EASTMAN and BENJAMIN BOSWORTH, Administrators of Ebenezer Eastman, deceased, *Defendants*.

A covenant, in an indenture of general apprenticeship, whereby the master binds himself, and his administrators, to provide meat and drink for the apprentice, extends to the administrators.

THIS was an action, brought on the covenants, in an indenture of apprenticeship, by which the intestate of the defendants, on his part, bound himself and *his administrators*, to furnish the apprentice with meat, drink, lodging, cloathing, &c. till he should arrive to the age of twenty one years. The suit was commenced in August, 1798.

Where several breaches are alleged, and a discharge pleaded as to part, and issue taken as to the residue, and a general verdict for the plaintiff, the Court will presume the verdict to have been for such breaches only, as were not covered by the special plea.

The defendants pleaded, as to any breach that happened in the life-time of the deceased, a written discharge from the plaintiff, dated the 3d of March, 1797, of all demands against the *estate* of the deceased to that time: And as to the residue, they pleaded *not guilty*.

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CHAPMAN.

A demurrer was taken to the plea in bar; and it was adjudged sufficient. Issue was taken on the plea of not guilty; and a general verdict was found, that the defendants were guilty, *in manner and form, as the plaintiff, in his declaration, had alleged*. Damages were assessed. The defendants filed a motion in arrest, which was adjudged insufficient.

In the writ of error, the general error was assigned.

- *Edwards*, (of New-Haven) for the plaintiffs in error, contended,

1. That the declaration is insufficient, for that the covenant, in this case, is personal. When an apprentice is bound, the parent or guardian *confides* in the master himself, and cannot be supposed to bind the apprentice to the master's executors or administrators. The apprentice, therefore, on the death of the master, becomes discharged, and, of course, the apprenticeship is at an end. He cited, in proof of this position, *King and Queen v. Prat*, (a) *King v. Peck*, (b) and *Baxter v. Benfield*. (c)

2. That the discharge of all demands against the *estate* of the deceased, must be a bar to the whole claim of the

(a) 12 Mod. 27.

(b) 1 Saik. 66.

(c) 3 Str. 1266. See 3 Bac. Abr. 555, 6, 7.

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plaintiff, as the defendants were liable only as administrators, so far as they had estate of the deceased.

3. That the verdict, being general, covers all the breaches ; and, therefore, the jury may have assessed damages for the breaches, for which a discharge was given.

*Backus*, (of Pomfret) for the defendant in error, argued, that the deceased bound himself, and *his administrators*, to provide meat, &c. ; that this covenant would hold the administrators, as long as they had the estate of the deceased ; and that, though where an apprentice was bound to learn a *particular trade*, or *mystery*, the death of the master should dissolve the contract, yet, in this case, the apprenticeship was general. No art, or trade, was contemplated ; and, therefore, the covenant continued. (*d*) This covenant being to find meat, drink, &c. the administrators are liable, as though the deceased had thus bound himself to provide for any other purpose.

As to the third point, he contended, that the Court ought now to presume, that the jury found damages only for the breaches not covered by the special plea.

THE COURT affirmed the judgment. DAGGETT and SMITH, *Asts.* excused themselves from judging, on the ground of their being counsel in such a case, at *Fairfield*.

(*d*) 4 *Bac. Abr.* 579. 3 *Bac. Abr.* 95, 6. *Sid.* 215. *pl.* 21.



## Bostwick v. Lewis.

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In the Court below,

WALKER LEWIS, *Plaintiff*; BENJAMIN BOSTWICK, AUSTIN NICHOLS, AARON GREGORY, EBENEZER SMITH, and AZOR RUGGLES, *Defendants*.

THE declaration charged the defendants with a combination to defraud the plaintiff, in the sale to him of 25,000 acres of Virginia land. The fraud charged was, in making false representations, respecting the title and quality of the land. *Nichols*, one of the defendants, was defaulted. The other defendants pleaded, severally, not guilty. On trial to the jury, the plaintiff offered depositions taken before justices of the peace in Virginia. The only objection to them was, that justices are not authorized, by the laws of that State, to take depositions. The only mode of taking depositions, there, is by commissioners, appointed for that purpose. The plaintiff also offered to prove, by witnesses, what *Nichols*, who had been defaulted, had said respecting his entering into the combination with the other defendants, and practising, with them, the fraud set forth in the declaration. This was objected to, on the ground, that his confessions should not be introduced to affect others. The Court overruled both the objections; and the jury found a verdict against all the defendants, with \$3,860 damages.

Depositions taken before justices, in a state where justices are not empowered to take depositions, may be read in our courts, if they would be admissible, had they been taken in this State.

Where there are several defendants, and one of them suffers a default, and the others plead to the action, the confessions of the former may be given in evidence, on the trial, to enhance the damages against all the defendants.

A bill of exceptions was filed; and the matters therein contained were assigned for error.

*Smith*, (of Woodbury) for the plaintiffs in error.

*Edwards* (of New-Haven) and *Daggett*, for the defendant.

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By THE COURT, the judgment was affirmed, NEWBERRY, SEYMOUR, and ALLEN, *Asts.* dissenting.

Depositions, under similar circumstances, have always been admitted, before our Courts. The objection, therefore, is too late. There is a difficulty of convicting any man, who deposes out of the State, of perjury, unless he should come into this State ; but this never formed an objection against reading such depositions. In the case of *Omichund v. Barker*, (a) the Court were, on this point, unanimous.

The testimony respecting *Nichols's* confessions, was proper, to shew the amount of damages ; and, though it might affect the others, that forms no reason why it should not affect him. He, though defaulted, was on trial as to the *quantum* of damages ; for the verdict ascertains damages as to all the defendants.

(a) *Willes* 538.

## Ogden v. Lyman.

The Court will not erase a writ of error from the docket, which has no date, but was served in October, and returnable in June then *next*. On plaintiff's withdrawing such writ, defendant may enter for costs, but no damages will be assessed in his favour.

THE plaintiff made a motion to erase this case from the docket, the writ of error having no date.

*Perkins*, (of Hartford) for the defendant, contended, that its having been served on the 5th of October, 1801, and returnable to the Court of Errors in June then *next*, was sufficient, without a date.

*Brown*, *contra*, insisted that it was a nullity.

THE COURT refused to erase it.

The plaintiff then withdrew his suit. The defendant entered for costs, and moved the Court to assess damages in his favour, and, as such, to allow interest on the judgment below. This was objected to, by the plaintiff's *Counsel*, on the ground, that as the writ of error was not dated, it could not be a *supersedeas*.

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THE COURT, by the casting vote of the GOVERNOR, refused to allow the damages, but allowed costs.

## Cornwell v. Isham.

In the Court below,

THOMAS CORNWELL and JOSEPH SHEPHERD, *Appellants*;  
JOSEPH ISHAM, Executor of *Pierpont Bacon*, deceased,  
*Appellee*.

THIS was an appeal from a decree of the Court of Probate, in the district of East-Haddam, establishing the last will and testament of said *Pierpont Bacon*.

The reasons stated by the appellants, in support of their appeal, were, that they were next of kin to the testator; that by said will, he gave \$30,000 to the inhabitants of the First Society in Colchester, for the purpose of supporting a school in said Society, at such place, near the meeting-house, as said inhabitants should agree upon, for the instruction of youth in reading and writing English, in arithmetic, in mathematics, and the languages, and such other branches of learning as said inhabitants should direct; that after providing for the due management of the property thus given, he directed that the rents and interest should be annually received, and improved, for the support of said school; and that the per-

The inhabitants of an incorporated society, to whom property is devised, for the support of a school, are competent witnesses to attest the will.

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son, by whom said will was drawn, and the witnesses to the same, were inhabitants of said Society, residing near the meeting-house, possessed of large estates, and having minor children to educate at school.

The executor replied to these reasons, that said Society was large and wealthy, and had sufficient funds for the education of all their youth, in the ordinary branches of science, already provided.

To this replication there was a demurrer. The Superior Court adjudged the replication sufficient, and affirmed the decree of probate.

Error was assigned generally.

*Ingersoll* and *Hosmer* were of counsel for the plaintiffs in error.

The general exception taken to the decree of probate, was, that the witnesses to the will were incompetent, by reason of interest. In support of this general exception, several subordinate propositions were advanced, and enforced by argument.

1. Interest disqualifies, notwithstanding the *public*, as well as private, *object of the bequest*. Education, the object of this bequest, is undoubtedly of public importance ; but why should this constitute an exception to the general rule of testimony, when the question is on the validity of the execution of a will ? Was the will fairly executed, in presence of the persons prescribed by law, to protect the testator from imposition ? The statute makes no exception. The reason of the case makes none. The object is of benefit to the public ; but it is a *corpo-*

*ration interest*, and schools must be maintained, whether the will does, or does not, exist. The idea that a bequest to a corporation for schools, &c. may be proved by a corporator, is suggested in 1 *Gilb.* 252, and *Townsend's case* is cited. The case does not support the citation. In 2 *Sid.* 109. (a) the case is reported, and it was a devise to church-wardens, for the benefit of the poor; but the principle contained in *Gilbert* is not authorized by it. Besides, the reason assigned in *Gilbert* shews, that the doctrine is inapplicable here, "*because no man gets, or loses, by the event of the trial.*" It is not so here, where schools must be supported, and, of course, a bequest to support them relieves from taxation. Suppose a devise, to build and repair all the bridges in Colchester, forever; to build and repair their meeting-house; to support their poor; to build and repair their school-houses, and educate their children; to purchase new highways, and repair the old; to support a clergyman: these are all objects important to the public, and interesting to individuals. Every person would be stimulated, by motives of private interest, and of public good, to wish them ardently. Is a person of large property, declining in health, safer in such hands, than with distant relations surrounding him, who become legatees, and parcel out his property?

2. The next proposition in order, is, that the inhabitants of the First Society in Colchester, particularly the witnesses to the will, had an interest in the devise. By interest is not meant, merely something desirable to increase their happiness,—their enjoyment,—and to heighten their feelings. This the law denominates *influence*; and however much it may sway mankind, it has been thought most eligible to draw the line against *pecuniary*

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interest only. Now, by what process of reasoning can it be evinced, that \$30,000 devised to that corporation, for building and repairing school-houses, and for educating youth, is not a pecuniary interest? Is it because Colchester is a wealthy society? But, may not the saving of their wealth, by the support of schools and education of their children, be an interest? Their school funds may be augmented, or may be spared to other purposes. A school of a higher order may be established. If the corporation of Colchester should have a superfluity of wealth, undoubtedly the legislature would permit the application of the Western Reserve fund to other than school purposes. Finally, the bequest would be singularly useful, if the western drain should be choked up; if our monies should evaporate, and our bonds be worse than white paper.

It may be objected, that there is nothing *to bring to market*. But, is that the criterion? Suppose a fund is constituted to pay the pastor's salary;—is there no interest, because there is nothing to bring to market?

3. The interest was not trifling, remote, or contingent. First, as to its being trifling. If such were the fact, it would not avail. (b) The idea, that it would avail, cannot be supported. *Townsend's case*, in 1658, and some others about the same time, probably went on that idea. But, since the statute of frauds, no such determinations have been made, unless in conformity to particular statutes. Thus, for penalties not exceeding 20*l.* going to the parish, by *Stat. 27 Geo. 3. c. 29*, parishioners may be witnesses to prove the offence. By *Stat. 1 Ann. c. 18*, the inhabitants of a county are permitted to testify, though *by common law prohibited*, on indictments

against the county, for not repairing bridges and highways. So, by *Stat. 8 Geo. 2. c. 16*, the inhabitants of a hundred, when sued on the statute of *Winton*, may testify. So, by *Stat. 3 and 4 W. 3. c. 11*, in actions against church-wardens, for money mispent, the inhabitants of the parish, other than such as take alms, may be admitted. (c) But, in all these instances, though the interest may be ever so trivial, nothing short of a legislative act could admit the witnesses. The cases in *Espinasse's Digest* p. 715, are all of that class, where there was *no interest at all*, except in the one of the *Steward*, who was admitted from the necessity of the case.

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But in point of *fact*, how trifling is the interest? The amount of property concerned is \$30,000, the annual interest of which is \$1,800, very unlike a trifle!

In the next place, as to the remoteness and contingency of the interest. The witnesses were not mere trustees; they were *cestuy que trusts*; they were devisees, — parties to the devise. The interest, in this case, is no more remote, than any other interest under a will is. Because it is not tangible, by the witnesses; because the Society are trustees, and manage with it, as with corporation property, is it, therefore, *remote*? It is no more remote than the Western Reserve property. Is it *contingent*? Not more so, than any other interest under a will. When the testator dies, it is *vested*. The fee of the property is in the corporation. How much benefit each man shall receive, is contingent. That depends upon his life, the number of years he shall remain in Colchester, the number of his children, the value of his property exempted from taxation. But, as to the witnesses to the will, so soon as the testator died, they had

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a portion of the fee in them, as members of the corporation. They were inhabitants of Colchester, men of wealth, having numerous offspring; and the contingency was the same, as if, this day, \$30,000 should be delivered to the witnesses, for the support of the ministry in Colchester. Whether they would live long enough to enjoy the donation, is contingent; but the interest is vested, and every part of their real estate is benefited by it.

The legal idea, annexed to the expression “contingency,” which shall admit a witness, is, where it is wholly uncertain whether he has any interest. Such is the case of an *heir apparent*; such the case of *creditors*. Both are remote possibilities; but no interest, through the mist of contingency, is discernible. But the case of a remainder man in tail, after the expiration of an estate tail, will illustrate the idea. He may not be admitted a witness to support a devise, under which he claims; “for he hath an estate, such as it is.” (*d*) Thus, in case of an estate to A. for life, remainder to his eldest son then living, in tail male general, who has ten sons, remainder to B.—B. may not testify. Yet he has *an interest, such as it is*; ninety nine chances to one against him.

Possibilities of a certain class, much more contingent than this interest, are devisable, descendible, and grantable. In the cases of *Selwin v. Selwin*, (*e*) *Gurnel v. Wood*, (*f*) *Marks v. Marks*, (*g*) *Goodright v. Searl* (*h*) and *Pinbury v. Elkin*, (*i*) there is a possibility only; but surely the Court would not, on that ground, say, that the remainder man might be a witness to the will,

(*d*) 1 Salk. 283, *Smith v. Sir R. Blackham*.

(*e*) 1 Bla. Rep. 222.

(*f*) Cited in 1 Bla. Rep. 225.

(*g*) 1 Stra. 129.

(*h*) 2 Wils. 29.

(*i*) 1 P. Wms. 564.



The true principle is mentioned, by Lord CAMDEN, in *Doe d. Hindson v. Kersey*. (j) “It is impossible to say what degree of interest will have *no influence* on

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(j) The case of *DOE on the demise of HINDSON, et ux. et al. v. KERSEY* was decided in the Court of Common Pleas, in 1765. Lord CAMDEN dissented to the judgment of the Court, and supported his opinion, by an argument, which, in legal skill, and judicial eloquence, has, perhaps, never been surpassed. This argument, which is not contained in any book of Reports, was published in quarto, in 1766; but, at this time, the printed copies are, in England, extremely scarce; in America, there are none. By the great research, and the kindness, of a professional gentleman, to whom I am indebted for many other communications, I have been furnished with a manuscript copy, with permission to publish it, for the benefit of the profession.

THIS was a special case, upon an ejectment of one messuage, twenty acres of meadow, and twenty acres of pasture, with the appurtenances, in Maulsmeabourn, in the Parish of Crosby Ravensworth, in the County of Westmoreland. It was tried at Applebee Summer Assizes, 1760, before Mr. Justice BATHURST.

*John Knott*, being seized in fee simple of a messuage, and other tenements, made his will in writing, on the 16th of August, 1734, in the words and figures following, that is to say :

“In the Name of God, Amen. I *John Knott*, of Maulsmeaburn, in the Parish of Crosby Ravensworth, and County of Westmoreland, yeoman, being of good health in body, and of a disposing mind and memory, make this my last will and testament, as followeth, hereby revoking all former wills by me made. As to my temporal estate, which GOD in mercy hath lent me, if by his Providence, it is continued to me to the end of this my temporal life, without a necessity of selling or incumbering it, and that I have no issue, then, by GOD’s permission, I dispose of it as follows : I give and devise unto *Isabel*, my dear wife, my whole estate of lands, to have and to hold during her natural life, but with this proviso, that, in case there be occasion to raise money for the payment of my just debts, after sale made of what she can spare, I do hereby give unto her, my said wife, as good and full power and lawful authority, as I myself now have, to sell and convey my eleven grasses, or cattle gates, in the

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“ the minds of the witnesses. It is better, therefore,  
 “ that the rule should be inflexible, than that it should  
 “ bend with the discretion of the judge.”

Lordship's pasture, commonly called Cow Close, and Ox Close, viz. six whole gates, and two ancient half gates, belonging to the estate I purchased of *Oliver Whitehead*, and four gates I purchased of *Thomas Barrow*. Item, after the decease of my wife, I give and devise my dwelling house, erected upon the green in Maulsmeaburn, and the barn and byar I purchased of *Thomas Barrow*, and all the lands now in my possession, which I bought of the said *Barrow*, by what name or names soever called, from Meaburn Green at the East end, to Wickerslack Field at the West end, and adjoining to the grounds of *William Garnett* on the North side, (save that the Garth adjoins to *William Thwayter's*, and the Ing Croft to *Margaret Darby's* lands) and to the ground of the said *William Garnett* and *John Knott* on the South side, to have and to hold the said lands and houses to my trustees, herein after named, (whom I humbly desire to accept the said trust) and to their successors forever, viz. *John White* of Maulsmeaburn, my brother-in-law, *Christopher Dent* of Frainland, *Robert Burra* of Dryevers, and *William Burra* of Maulsmeaburn, and they the said feoffees in trust, and their successors forever, are desired, and hereby humbly required to lett or sett the said houses and lands, and yearly dispose of the rents and profits thereof, at Martinmas and Whitsuntide, in every year after my said wife's decease, as hereafter desired and directed, and to no other uses or purposes whatsoever ; namely, I desire and require my said trustees, with all possible piety, to dispose of the yearly profits, as aforesaid, to such poor people within the Lordship of Maulsmeaburn (being legally settled therein) as I now name, that is to say, indigent orphans, under ten years of age, (which are yet unable to labour,) to poor aged people, (which are utterly past labour) to poor impotent people, which are lame or blind, (which cannot labour) and to put out the children of such poor people as above, either sons or daughters, apprentices, as soon as they are fit for it ; but, by no means, to encourage any idle persons, that are able to labour ; and I desire my said trustees and their successors, to meet every half year, to make a distribution of the profits arising from the said estate ; and when it pleases God, that any of them depart this life, I desire their survivors, at their first meeting, to nominate the fittest persons in Maulsmeaburn Lordship, and never any out of it, to execute this trust ; and I desire my trustees, at their half yearly meetings, to take a moderate refreshment out of the

4. There has been no settled practice to admit the inhabitants of a town or society to testify, in cases, in which the property of the corporation is concerned, or to which the corporation is a party.

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profits of the said estate, not exceeding four pence a man; and I most humbly beg, that in case any difference, or neglect, should happen, in future times, amongst my trustees, that the Honourable *Robert Lowther*, Esq. his heirs, and successors, at Maulsmeaburn Hall, will be pleased to inspect this affair, and examine if a due distribution has been made herein, and if otherwise, to make due regulations, according to this my desire and design; and it is my will and desire, that my trustees require such of the poor, as receive any of this charity, as are of ability to go to the church every Sunday, or as often as they are able, and the weather good; and I do desire and require my said trustees to pay five shillings yearly, and every year, to a proper person, that will keep the dogs out of Crosby Ravensworth Church, every Sunday, during divine service and sermon; and I do desire and require my trustees to pay yearly, and every year, five pounds to the master of the Free School in Crosby Ravensworth; and I further desire and require my said trustees, to take care, that the houses and fences, belonging to the above devised premises, be kept in good repair. *Item*, after the decease of my wife, it is my will, and I hereby give and devise to my true and faithful servant, *Ann Gibson*, if she survive my wife, the house, (now a stable) barn and byar, Garth, Ing Croft, Ing Croft Bottom, Croft Head, and Mainis Close, which I purchased of *Oliver Whitehead*, the East end opening to the street, in Maulsmeaburn, and the West end adjoining to the ground of *John Parkin*, and on the North side adjoining to the ground of the Honourable *Robert Lowther*, Esq. and on the South side to the ground of *William Sheppard*, senior, to have and to hold to the said *Ann Gibson*, during her natural life, or till the day of her marriage, and no longer; for this devise shall utterly cease and be void. *Item*, after the said *Ann Gibson's* decease, or marriage, I do hereby will, devise, and give unto my sister, *Mary Brown*, all the said house and croft in full, as above mentioned, which I purchased of *Oliver Whitehead*, to have and to hold to my sister, *Mary Brown*, during her natural life. *Item*, after the decease of my said sister, *Mary*, I do hereby will, devise, and give unto *Ann Kebson*, my niece, daughter to my said sister, *Mary Brown*, all the said house and croft in full, as above mentioned, (to *Ann Gibson*) and which I purchased of *Oliver Whitehead*, to have and to hold unto the said *Ann Kebson*, and her

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In the *English* practice, *Townsend's* case is almost the only instance, in which corporators have been permitted to testify, where the interest of the corporation was con-

heirs forever. *Item*, I do hereby will, constitute and appoint my dear and loving wife, *Isabel*, executrix of this my last will and testament. *Item*, I do hereby will, order, and appoint my executrix, to pay to *Ann Gibson*, my servant, twenty shillings, yearly, and every year, during their joint lives, or till the day of *Ann Gibson's* marriage, upon which said marriage day, this legacy is utterly to cease, and be no more, or longer, paid. *John Knott's* will, wrote by his own hand, on two half sheets of paper, the first written on both sides, and a part in the margin, dated 16th day of August, 1734."

The lessors of the plaintiff claimed title to the said messuage and tenements, in right of *Agnes*, wife of the lessor, *Samuel Hindson*, *Mary*, wife of the lessor, *Thomas Langhorn*, and *Elizabeth*, wife of the lessor, *Thomas Cowper*, as being cousins and coheirs of the said testator, *John Knott*.

The said defendant, *Elizabeth Kersey*, claimed under the said *Ann Gibson*, who, she (*Kersey*) insisted, was entitled, during her (*Gibson's*) life, or till her day of marriage, to the said messuage and tenement, under the will of the said testator, *John Knott*.

On the trial of this ejectment, it appeared, in the course of the evidence, "That the said *John Knott* afterwards, to wit, on the 19th day of October, 1746, at *Maulsmearburn*, in the said County of *Westmoreland*, died, seized of the said messuage and other tenements, as aforesaid; and, that the said paper writing was signed, sealed, and published, by the said *John Knott*, in the presence of the said *Henry Holme*, *Robert Burra*, and *John Mitchell*, whose names were subscribed thereunto in the presence of the said *John Knott*, the testator; and it also appeared, that the said *Isabel*, the wife of the said *John Knott*, died, on or about the 24th day of December, in the year 1756, and that, on her decease, the said *Ann Gibson* entered upon the house, lands, and other premises, devised to her, by the said will; and, that she is now living, and unmarried; and, that the said *Henry Holme* and *Robert Burra* were two of the devisees in the said will, upon the trusts therein mentioned, and were two of the three persons, who attested the execution of the said paper writing, purporting to be the will of the said *John Knott*; and, that the said *Hen-*

cerned. That probably was on a principle antiently practised on, that where the interest was *very small*, the testimony of the interested person might be admitted.

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*ry Holme* and *Robert Burra*, at the time of the publishing and attesting of the said paper writing, and the said *Henry Holme*, *Robert Burra*, and *John Mitchell*, at the time of the decease of the said *John Knott*, the testator, and at the time of their attesting the said paper writing, and continually from that time, and long after the decease of the said testator, were, respectively, seized in fee-simple of divers messuages, lands, and hereditaments, lying within the said Lordship and Township of Maulsmeaburn aforesaid, and that, during the whole time aforesaid; they, severally, were possessed of, and occupied the same, and inhabited within the said Lordship and Township, which was, and is, a large district, and from time immemorial contained a great number of inhabitants, and lay within the Parish of Crosby Ravensworth aforesaid, and maintained their own poor, separate, and apart, from the Parish of Crosby Ravensworth; and, that they, severally, for all the time aforesaid, were chargeable and taxable; and were actually assessed, taxed, and paid towards the poor, and unto all other, the taxes of the said Lordship and Township of Maulsmeaburn aforesaid; and it appeared, that before the time of the said trial, the said *Henry Holme*, and *Robert Burra*, had, respectively, released all their interest under the said paper writing, purporting to be the will of the said *John Knott*, to the other trustees therein named; and also, that the said *Henry Holme*, *Robert Burra*, and *John Mitchell*, had, severally, conveyed away, and disposed of, all their respective estates and interests in their said messuages, lands, and hereditaments, lying within the said Lordship and Township, before the time of the said trial. It also appeared, that the said paper writing was signed by the said *John Knott*, before the making of the statute of the 9 Geo. 2. c. 36. intituled, "An Act to restrain the disposition of lands, whereby the same become unalienable;" but the said *John Knott* lived till long after the 24th day of June, 1736, being the day from which the said statute was appointed to take effect:" Whereupon a verdict was given for the plaintiff, subject to the opinion of the Court of Common Pleas; and the question, reserved for the consideration of the Court, was,

"Whether, under the circumstances of this case, the said paper writing, purporting to be the will of the said *John Knott*, was sufficient, and effectual, to pass the said message, lands, and tenements

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But that idea has been exploded for more than a hundred years. The next case worthy of attention is the *water-bailage case*, (k) in which the question was, whether the

(k) Anno 1682.

of the said *John Knott*, unto the said *Ann Gibson*, (who survived the testator's wife) during her life, or until the day of her marriage; and, if the Court should be of opinion with the lessors of the plaintiff, they are to be at liberty to sign judgment, and take out execution thereon, with costs; but if the Court should be of opinion with the defendant, then the lessors of the plaintiff are to pay costs, as of a nonsuit.

Lord CAMDEN (a) delivered his opinion to the following effect.

Two questions arise out of this will :

1. Whether it is executed according to the statute of frauds ? (b)
2. If not, Whether the objection to it is cured by the late act ? (c)

The particular question under the statute of frauds, is,

Whether the witnesses are *credible* ?

To clear which, the following points must be taken into consideration :

1. Who are those witnesses, described in the act, by the word "*credible*?"

2. Whether the witnesses here come within that description ?

3. Whether this non-credibility can be purged, by any matter *ex post facto*, so as to establish the will ?

4. Whether allowing they cannot be admitted to prove their own

(a) *His Lordship's title, then, was only* "The Right Honourable Sir CHARLES PRAT, Knight."

(b) 29 Car. 2. c. 3. *perpetuated by* 1 Jac. 2. c. 17. s. 5.

(c) 25 G. 2. c. 6.

city of London had right to a certain duty for goods imported. Freemen of the city were offered as witnesses. The reporters differ, as to the decision of this case in the legacies, they may be let in to the other devises, wherein they have no interest?

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Upon some of these questions I shall be obliged to differ with the opinion of the Court of King's Bench, delivered by Lord MANSFIELD, in the case of *Wyndham v. Chetwynd*, or rather, (for so I wish to put it,) I shall agree with the judgment of the same court, (d) delivered by Lord Chief Justice LEE; for, as both the opinions are justified by authorities of equal weight, a man may take either side, without hazarding his reputation.—*Magno se judice quisque tuetur*.—I had rather have it said, that I concur with one great judge, than that I dissent from another.

The course I shall pursue is this:

1st. I shall endeavour to give you the scope of Lord MANSFIELD's argument, as I understand it.

2d. Then I shall lay down the method, in which I shall treat the subject; and, while I am establishing my own propositions, I will endeavour to answer the argument on the other side, as it falls in my way.

His Lordship's method of arguing, as far as I am able to collect it, I take to be this:

He first affirms, that this attestation of three witnesses is mere form, in which light the judges should always endeavour to get over the objection, in favour of wills. And many instances to this purpose are cited, shewing how liberally they have dealt with the statute, where the objection was formal only.

Then, with respect to the clause itself, he insists, that this is not a question of construction upon any words of the statute; for that no stress ought to be laid upon the word "credible," which is either misapplied, on nugatory, as included in the word "witness."

(d) That opinion was delivered on Tuesday, 22d April, 1746, Easter Term, 19 G. 2. 1 Bur. Rep. 425. 2 Stra 1253.

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Court of King's Bench. In 1 *Vent.* 351, it is said, that the witnesses were admitted, a bill of exceptions was filed, and afterwards their testimony was *waived*. In

That the whole clause, indeed, is ill penned, and inaccurate, and the world under a great mistake, in thinking it was drawn by Lord HALE, in which respect, *a judge may take greater liberties with it, than he otherwise could do.*

That the legislature could not seriously mean to prevent frauds, by this direction ; for, though it might be some guard, in theory, it was hardly any, in practice : They only meant to make the execution something more formal than it was before.

That the statute being deprived of the word "credible," the other word "witness" was to be expounded by common law analogy.

From whence this rule was taken, that, as at common law, no man was allowed to be a witness, to prove an interest for himself ; so, since the statute, no man shall, by his own subscription, take an interest, which he could not prove, at the time, by his own examination.

That the case of *Hilliard, v. Jennings (c)* goes no farther.

From the rule they framed, his *Lordship* is pleased to conclude, not only,

That a release, or payment, will re-establish the witness, if his incompetency really stands in the way ; but still further,

That such a witness may, even without a release, be competent enough to prove the will, for every person, except himself.

In opposition to this reasoning, I propose to maintain,

1. That this *credibility*, which I shall prove to be *competency*, is a necessary and substantial qualification of the witness, "at the time of attestation."

2. That if the witness is incompetent at that time, he cannot purge himself afterwards, either by release, or payment, so as to set up the will.

(c) *Reported in 1 L.d. Raym. 505. Com. Rep. 92. Carth. 514.*



2 *Show.* 148, it is reported, that the witnesses were not admitted, and that a bill of exceptions was filed. In *Golfeld v. Wilson*, (1) decided two years after the *water-*

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(1) 1 *Vern.* 254.

3. That he cannot be a witness, in that case, to establish any part of the will, but that the whole is void forever.

As my brothers differ with me, upon the second question, by holding that the witnesses are competent by the rule of law, I might, if I thought it fitting, leave all the other points undiscussed, as not absolutely necessary to the decision of this case; and I should have been glad, for several reasons, to have done it, if other reasons, more weighty with me, had not determined me the other way.

One is, that as the whole argument is connected by a chain, those parts, whereon I am bound to speak, could not be so clearly illustrated, nor would they, as I apprehend, be urged with half the force, if the others were omitted; for they do all throw light upon each other, and the former are proper and material introductions to the latter.

Another is, that as the same case may again exist, and even this case may yet come before another court, and likewise, as no cases of the like kind, in my opinion, are cured by the late act, (f) but that future wills, as well as those that are past, under such like attestations, must occasion the same questions, when they happen to be contested; I think myself bound in duty to declare my dissent to the last opinion of Lord MANSFIELD, and do my best endeavours to restore Lord Chief Justice LEE's, which has been so considerably shaken, I may say, over-turned, because the last opinion, (g) if it is acquiesced under, almost always governs, and becomes the leading case.

So that if I should now decline this argument, my silence would be construed into an assent to Lord MANSFIELD's doctrine, which I am clearly satisfied is erroneous.

These reasons, no doubt, prevailed upon his Lordship to declare himself against Lord Chief Justice LEE, in a case where, according

(f) 25 G. 2. c. 6.

(g) *Judicia posteriora sunt in lege fortiora.* 8 Co. 97.

1802. *bailage case*, Lord Keeper NORTH agrees with Shower.

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In 1694, Lord SOMERS declares, "that the cases where  
"the party was concerned in interest, though never so

to his own opinion, he might have avoided the question, and yet have pronounced the same judgment; but he thought it more manly to meet a principle, in open combat, which he thought wrong, than to give further strength to that error by avoiding the contest.

I have hitherto treated the argument I am answering, and I am obliged to treat it throughout, as Lord MANSFIELD's argument, and not the argument of the court, because his *Lordship* has told us it is his own, and he is personally answerable for all its errors; as for the opinion of the court, he only tells us, in general, they held the will duly executed, according to the statute, but has not informed us upon what grounds that resolution was framed; so that I am not able to say whether the *puisse Judges* (*h*) agree with his *Lordship* in all his three grounds, or if not in all, in which of those three; nor do I think it right now to enquire, because the practice of explaining a publick resolution, in private, by parol, might be attended with some bad consequences.

I must, therefore, bespeak your patience, for I am afraid I shall be very tedious; if I should, it must be imputed to the high respect I bear to that great person with whom I differ, as it would be an unpardonable neglect to pass over, or disregard, even a single word, that he has thought material.

I am very sensible, that I am destroying an honest will, upon a nominal objection; for the interest here, which I must treat as a serious incapacity, is too slight, even to disparage the witness's credit, if he could be sworn; and yet I must adjudge him, upon this objection, to be a person so destitute of all credit, that he is not fit even to be examined; but as it is not my business to decide cases, by my own rule of justice, (*i*) but to declare the law as I find it laid down, if the statute of frauds has enjoined this determination, it is not my opinion, but the judgment of the legislature.

As I am satisfied, however, that this will was fairly executed, I

(*h*) WRIGHT, DENISON, and FOSTER. 2 Str. 1253.

(*i*) *Judex bonus nihil ex arbitrio suo faciat, nec proposito domesticæ voluntatis, sed juxta leges ac jura promunciet.* 7 Co. 27. Calvin's case.

“small, have always prevailed, and so it was resolved, upon great debate in the case of the city of London concerning the water bailiff.” In *Dodswell v. Nott*, (m)

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(m) 2 Vern. 317, anno 1694.

am very glad my brothers, by differing with me, have enabled me to give judgment in favor of it, against my own opinion.

Before I proceed, I desire it may be understood, that I do, by no means, deny the authority of the judgment in *Wyndham, v. Chetwynd*; for that case was not determined only upon the general principles, which I am obliged, in this argument, to deny, but upon its own general as well as particular circumstances, none of which can be applied to the case of a mere legatee witness.

The first general question, then, or rather enquiry, being this, who are those witnesses, which are described in the act, by the word “credible”?

I answer, in one word, they are *competent* witnesses, and no other.

And when it is further asked, at what time must the witness be indued with this qualification?

I say, that he must be clothed with it, *at the time of attestation*.

This, then, is the proposition that I mean to maintain:

That the witness’s credibility, (which I shall prove to be competency) is a necessary and substantial qualification, at the time of attesting.

To establish this, it will be incumbent on me to prove, that the legislature set up these witnesses as a guard, to protect the testator from fraud, in that critical minute, when he was about to execute his will; which I will do from the spirit, as well as the words of the statute; and shall then confirm my construction by the authority of *Hilliard v. Jennings*, which is a case in point upon this question.

In the out-set, I beg leave to make one observation, which I desire may be attended to, because it should be carefully kept in view, throughout the whole argument; and it is this:

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LORD SOMERS decided, that when the dispute was touching the loss of money given to the parishioners, no inhabitant of the parish should be admitted a witness.

That there is a great difference between the method of *proving* a fact, in a court of justice, and the *attestation* of that fact, at the time it happens. These two things, I suspect, have been confounded ; whereas it ought always to be remembered, that the great inquiry upon this question is, how the will ought to be *attested*, and not how it ought to be *proved*.

The new thing introduced by this statute (*j*) is the attestation ; the method of proving this attestation stands as it did upon the old common law principles.

Thus, for instance, one witness is sufficient to prove what all the three have attested ; and though that witness must be a subscriber, yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must be always produced, because it is the best evidence. This we see in common experience ; for after the first witness has been examined, the will is always read ; and in the case of *Hilliard v. Jennings*, you will find that the objection was not to the want of due proof in court, but whether the devisee was a *credible witness* within the meaning of the statute ?

This, I am afraid, has not always been attended to ; but some persons have been apt to reason upon this point, as if the statute had directed the will to be *proved*, by three credible witnesses, forgetting the difference between the *subscription*, and the *proof* of that subscription.

I proceed, now, to shew, that the witnesses must be credible, at the time of attestation, within the true intent and meaning of the act.

This clause has introduced a new ceremony to be observed in the publication of wills. This act of publication is to be done before three credible witnesses. This I call the *substance* ; because these are the acts to be done by the parties. When this is done by the testator, and has been seen, and heard, by the witnesses ; then,

The testator is to sign, and the witnesses are to subscribe, in the presence of the testator. This is the *form*.

(*j*) 29 Car. 2. c. 3. *perpetuated* by 1 Jac. 2. c. 17. s. 5.

From this time the *quantum* of interest has been holden to be immaterial. If interested at all, the witness shall not be admitted. In *Brown v. Corporation of London*, (n)

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(n) 11 *Mod.* 225, anno 1710.

The difference is apparent; for the signing and subscription in the presence of the testator, is only the *mode of recording the act*, by committing it to writing, at that time; and though the formal, as well as the substantial part, are equally essential to the perfection of the will, yet judges may fairly be more liberal with the form, than they can with the substance.

Now, if the question be asked, whether the quality of credibility is requisite in the witness, at the *time of attestation*? I answer, nothing can be more clear, upon the words, if credibility means any thing; for what is the clause but a description of those solemnities, that are to attend the execution, among which the presence of credible witnesses is made necessary? It is admitted, that if any other description had been added to the witnesses, that must have belonged to them at the time; as if three Englishmen, or three full aged persons, had been required, these adjuncts would have been necessary at the time; and if so, I see not, by what rule of construction, one epithet or adjunct can be distinguished from another.

Nay, if the word credible be expunged, and the word *witness*, as it is admitted, does, *ex vi termini*, include *competent*, still competency must be essential to the witness, at the time of execution. So, *quâcunque viâ data*, an interested witness cannot be the witness the law intends to be present at the execution.

But this, it may be said, is cavilling upon words, and an artifice to evade the true question, which turns upon the spirit and intention of the law; for, if the solemnity was not really introduced to *protect the testator from fraud*, but only to add a little more form to will-making, the court ought to attend more to the *number*, than the *quality*, of the witnesses; and the law will be satisfied, if they are made credible at the trial.

Now, although this construction will be a manifest violence upon the words, yet I will meet the argument fairly, upon the great ground, and maintain my opinion, upon the very spirit and intention of the act.

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on a question respecting prescription for toll, *HOLT*, Ch. J. would not permit a corporator, *irregularly disfranchised*, to be a witness. In *Attorney-General v. Wy-*

I say then, that the legislature ordained, and meant to ordain, the three witnesses *to be a guard to the testator against fraud, at the time of executing the will*; and, that the witnesses are called in, not only to *attest*, but to *protect*.

This is the true state of the question between us. Say the other side, credible signifies nothing; the whole business is mere form; so little has the statute to do with this point, that the question is not a question of construction upon any words of it.

I must, on the contrary, maintain it to be a question of construction. To say the truth, the point must, either way, turn upon the construction. If the statute determines the question, it is simply a question of construction; and if it is to be laid aside, you must still construe the statute, to get rid of it. But to proceed,

Before the statute of frauds, any scrap of writing, though it was neither signed, sealed, nor written by the testator, might have been established, by the testimony of one single witness; nay, though this person was legatee, if he released, he was a good witness.

This did, in fact, happen in a very remarkable case, that of *Sir Francis Worsley's will*: (*k*)

One *Baynham*, of Gray's Inn, wrote a will for *Sir Francis Worsley*, which will was in loose sheets, dictated, as *Baynham* said, by *Sir Francis*, who had neither signed nor sealed the same, though the writing itself purported both; but *Sir Francis*, who intended to write the same over again himself, said, that, in the mean time, that should be his will. *Baynham* was the only witness to all this transaction, and he was a trustee, a legatee, and an annuitant under the same will. An objection was taken to *Baynham's* testimony, as a legatee, whereupon they shewed a release, and proved that he had received the money.

(*k*) *This case is reported in Sid. 315. pl. 33. 2 Keb. Rep. 128. pl. 82. by the name of Stephens, Lessee of Gerard, v. Lord Manchester, 18 Car. 2.*

*burgh*, (o) Lord PARKER decided, that "parishioners  
"were not good witnesses to prove a charity given to  
"the parish." In *Burton v. Hinde*, (p), decided as late

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(o) 1 P. Wms. 600.

(p) 5 Term Rep. 174.

And yet, says *Kemble*, the court conceived this a sufficient will, and the jury found it so, and verdict for defendant, lessee of his bastard, against the true heir at law, lessor of the plaintiff.

This determination was clearly legal, at that time ; yet the reporter thought, (as every other person, that reads it, must) that it was a case of great hardship, to disinherit the heir, by a will so made, and so attested, the same person being drawer, legatee, and witness.

The two great and alarming considerations upon this case were these : that such an unfinished paper should be deemed a will ; and that one person, so interested, should be the only witness.

All the world must see, as soon as this case was determined, that testators would be delivered up to the practices of crafty and designing men, if such wills, and such witnesses, were suffered to prevail any longer. The testimony was rather worse than the will ; unless any man can think, that a wicked will becomes honest, by the witness's sealing a release, when that very release that lets in his evidence, establishes the fraud.

Whether this case was, in truth, the occasion of the will clause in the statute of frauds, as some have thought, I do not know ; but when you reflect that this case happened in 18 Car. 2. the law made but eleven years after, which is no great length of time to prepare, digest, and finish this noble law, which deserves to be called a *code*, rather than a single Act of Parliament ; and when it is found, by the provision of this new law, that, for the future, the will is to be a perfect instrument, signed by the testator, and that three credible witnesses, at the least, are introduced, to be present at the transaction, pointing directly at the two grievances in *Sir Francis Worsley's case*, and going no further ; the provision is so remarkably adapted to meet with that case, that I cannot be brought to believe, it was either neglected or forgot. However that may be, I am at least sure, that this was a most material case, to shew the necessity of this provision.

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as in 1793, in trespass *quare clausum fregit*, the defendant justified under a right of common; the plaintiff claimed under a corporation, to which a rent from the

The clause of the statute is made in the following words :

“ All devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.” *Stat. 29 Car. 2. c. 3. s. 5.*

Now, that the statute had a main view to the quality of the witness, will appear from this consideration, viz. That a will is the only instrument in it required to be attested, by subscribing witnesses, at the time of the execution. It was enough for leases, and all other conveyances, marriage agreements, declarations, and assignments of trust, to be in writing.

These were all transactions of health, and protected by valuable considerations, and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud, that could be practised in these cases, after the contract was reduced into writing,

But a will was a voluntary disposition, the arbitrary, capricious pleasure of the testator, executed suddenly, in the last sickness, almost *in articulo mortis*.

If the man is sane, his will must be established. Cruelty, ingratitude, unnatural preferences, or exclusions, are no objections to such a will. *Stat pro ratione voluntas*. Was the testator in his senses, when he made it? is the only question, that can be asked; and, consequently, the time of the execution is the critical minute, that requires guard and protection.

Here, you see the reason, why witnesses are called in, so emphatically.

What fraud are they to prevent?

EVEN THAT FRAUD, SO COMMONLY PRACTISED UPON DYING



common was reserved ; and the issue being on the sufficiency of common, freemen of that corporation were called as witnesses for the plaintiff ; but they being objected

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MEN, WHOSE HANDS HAVE SURVIVED THEIR HEADS ; WHO HAVE STILL STRENGTH ENOUGH TO WRITE A NAME, OR MAKE A MARK, THOUGH THE CAPACITY OF DISPOSING IS DEAD. WHAT IS THE CONDITION OF SUCH AN OBJECT, IN THE POWER OF A FEW, WHO ARE SUFFERED TO ATTEND HIM, WHEEDED, OR TEIZED, INTO SUBMISSION, FOR THE SAKE OF A LITTLE EASE ; PUT TO THE LABORIOUS TASK OF RECOLLECTING THE FULL STATE OF ALL HIS AFFAIRS, AND TO WEIGH THE JUST MERITS, AND DEMERITS, OF THOSE, WHO BELONG TO HIM, BY REMEMBERING ALL, AND FORGETTING NONE !

Such an act, to be done at such a time, is so pregnant with suspicion, that a formal declaration of the testator's sound and disposing mind and memory, though he is weak in body, is grown to be a common introductory clause to almost every testament.

Who, then, shall secure the testator, in this important moment, from imposition ? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane ?

The statute says " three credible witnesses." What is their employment ? I say, to inspect and judge of the testator's sanity, before they attest. If he is not capable, the witnesses ought to remonstrate, and refuse their attestation.

They are infamous, if they do not. In all other cases, the witnesses are passive ; here they are active, and, in truth, the principal parties to the transaction. The testator is intrusted to their care.

Sanity is the great fact the witness is to speak to, when he comes to prove the attestation ; and that is the true reason, why a will can never be proved, as an exhibit, *visâ voce*, in chancery, though a deed may ; for there must be liberty to cross-examine to this fact of sanity. From the same consideration, it is become the invariable practice of that court never to establish a will, unless all the witnesses are examined ; because the heir has a right to proof of sanity, from every one of them, whom the statute has placed about his ancestor.

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to, on the ground of interest, the Court said the objection must prevail, however small might be the interest in reality.

This practice, which is coeval with the statute, is a strong argument to shew, that the Parliament called in the witnesses to prevent insane disposition ; and that their business, therefore, is not barely to attest, but to *try, judge, and determine*, whether the testator is *compos* to sign and publish.

And yet, this duty of the witness, this solemn trial of the testator's sanity, has been called a matter of form, and of no use to prevent frauds.

I am of a very contrary opinion. It is not a very easy thing to procure three disinterested witnesses to attest the will of a *non compos*. That many fraudulent wills have been made, since the statute, and all formally executed, I have no doubt ; and I am afraid these frauds will continue to the end of time ; for what law can totally extinguish wickedness, and reform mankind ? But, if a law is to be slighted, because it does not entirely eradicate the mischief it was made to prevent, no law whatever can escape censure. Many bad wills have been made ; but, who can tell me how many have been prevented ?

The design of this statute was to prevent wills that ought not to be made, and always operates silently, by intestacy. I have no doubt, (for this assertion cannot be proved) but that a thousand estates have been saved, by this excellent provision. It is called a *guard in theory only* ; whereas almost every delirious paralytic, that is suffered to die intestate, is preserved by this law, and gives testimony of its utility.

But if you once treat this part of the solemnity as a form, and call the *devises* and *legatees* into the sick man's chamber, the whole ceremony will then, I admit, become a mere form ; nay, it will be worse, it will be a snare to the testator ; and, instead of being a *prevention*, it will be a *protection*, of fraud.

I will close this reasoning with the words of the Court, in *Lea v. Libb*, as reported in *Carth.* 37.

“ 'Tis true, the intent of the statute was to prevent fraud ; but

In this State, there has been no settled practice of admitting corporators as witnesses, in cases where the corporation is interested, except upon the principle of *ne-*

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“ though no suspicion of fraud appears in this case, yet the statute  
“ hath prescribed a certain method, which every one ought to pur-  
“ sue, to prevent fraud.” (!)

If this is the true language of the statute of frauds ; the consequence is undeniable, that the incompetency can never be purged, and that the whole will is void forever.

This consequence is so plain, that the argument on the other side, in order to call off the attention from this idea of fraud, has laboured to disparage and enervate the whole clause. With this view it is urged, that the word “ credible ” ( which I consider as the key of the clause ) deserves no notice, but ought to be expunged, being, as it is contended, either improper, or, at least, nugatory. Nor does the argument stop there ; but proceeds to pronounce the whole clause, loosely, and inaccurately penned.

So that, at last, this famous law, every line whereof, according to Lord NOTTINGHAM’s opinion, (*m*) was worth a subsidy, turns out to be careless and ill penned, nothing more than a fruitless, an ineffectual solemnity. But to proceed,

1. The word “ credible,” it is said, either means too much, and is misapplied, or else it is included in the word “ witness,” and means nothing ; that the epithet credible has a precise meaning, universally allowed, and is never used as synonymous to competency ; that when it is applied to testimony, it presupposes evidence to have been given, and after the competency of the witness is allowed, the objection to his credibility arises. In this sense, it is absurd to apply a quality to the witness, at the time of attestation, which can never belong to him, till his testimony is examined in court.

As the argument here turns altogether upon the meaning of this word, I wish it had given us that precise meaning, which seems universally allowed. That is not done by any definition ; it was

(*l*) Mr. Justice DOBEN said, “ It would be a dangerous consequence to make so wide a breach in the statute.” Comb. 176.

(*m*) Lord Keeper NORTH’s Life, 109.

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*tessity.* In *Smith v. Barber*, (q) the inhabitants of Torrington, residuary legatees, were admitted to testify, that the defendant, *Barber*, had collected certain mon-

(q) 1 Root 207, anno 1790.

thought so plain and obvious that there was no occasion for it; and, therefore, instead of telling us what the word does mean, the argument is pleased to assert what it does not mean: *i. e.* It is never used as synonymous to competent.

In answer to which, I beg leave to say, that it may, even in common speech, be so used; and further, in this statute, it must have that meaning, and no other.

And that this is not a *gratis dictum* will appear from the case of *Hilliard v. Jennings*, wherein the Court of King's Bench not only declared the two words "credible" and "competent" to mean the same thing, but rested their main argument upon that very meaning of the word "credible."

But of this more hereafter; in the mean time, I will endeavour to explain the sense of this word "credible" as I understand it; and hope to shew, that the statute has used it very properly, and that it is not misapplied.

I understand the word "credible" to mean *worthy of credit*. When applied to the person of a witness, it bespeaks him to be *a person of capacity to deserve credit*. I say, of capacity to deserve it: I go no further, because no man can be sure of obtaining credit, let him be ever so credible; and, therefore, I suspect that the word "credible" has been used improperly, in the last passage, for credit, which means a great deal more.

Now a witness is credible in two senses:

1. When this quality is predicated of him, or denied to him, in the abstract, without referring to the testimony of any particular fact.

2. He is credible, or not, in another sense, when the matter of his testimony, in a particular case, comes to be discussed and tried.

A man, therefore, may be credible in the first sense, though *not* credible in the second, and yet the word properly used in both.

ies, &c. "The Court doubted, at first, upon the principles of the law ; but, *upon the ground of necessity*, as "the said *Daniel* [the testator] lived and died in said Tor-

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When you apply this epithet to legal witnesses, that law, where it is so applied, must determine the meaning.

Now, if I ask this general question, who are credible witnesses by the law of England, *i. e.* persons worthy to obtain credit ? If the question is not absurd, I can give but one answer to it : All such persons as are permitted to give testimony in the courts of justice. Who *not* credible ? Those who are not permitted.

The very admittance of the person, to be examined, proves him, in the estimation of law, worthy of credit, while he stands unimpeached, by calling him competent.

But, when a witness's testimony is under trial, and I am asked, whether such a deponent is a credible witness to those facts ? I must take in a thousand circumstances, in order to judge fairly of his credibility *quoad hoc*.

In this case, I admit that you presuppose the evidence given, because his credibility then depends not only upon his personal character, but likewise upon the evidence given, with many other circumstances.

This general character of credibility in the abstract, is so inseparable to the person of a disinterested witness, that nothing but an infamous judgment can ever deprive him of it. He is disbelieved in one cause, he is, notwithstanding, a credible witness in the next ; he fails there, yet in a third he may obtain credit ; let his conduct, or general character, be what it will, he is a credible witness to every fact, wherein he has no interest.

When I say that all indifferent witnesses are credible, I do not mean *equally so* ; for credibility may have its degrees ; his rank or character may make him more or less credible ; but it is sufficient for my purpose, if the worst is intitled to any degree of credibility.

Now, where a man's testimony is impeached, this general character of credibility is no longer considered otherwise than as a circumstance ; and the inquiry is changed into a scrutiny of his credi-

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“rington, it was to be presumed, that other evidence could  
 “not be had.” If it were the settled practice of our  
 State, how easy would it have been to say, the interest

bility to that particular fact. And here, men of all ranks, character,  
 and fortunes are equally liable to the same inquiry ; it is by no means  
 a consequence, that the best man should turn out the most credible  
 witness ; every day’s experience proves the contrary ; and a bad man  
 is not only allowed to be a good witness, but, sometimes, even a  
 better than a much better man.

In this place, it is proper to observe, that the *good character* of the  
*man* has been confounded with the *credibility* of the witness, which  
 are two different things ; for the statute was never so simple, as to  
 require the attestation of *honest men*,—a matter impossible either to  
 be known, or tried,—but only demanded *indifferent witnesses*, a de-  
 scription equally understood, and plainly triable ; indeed, every man  
 living is honest enough to tell the truth for a third person, if he has  
 no motive to do otherwise.

Nor is it strange, that a bad man, in some cases, should be a cred-  
 ible witness, and a good one not credible ; for credit is not in the  
 power of the witness, but is lodged in the third person, and is a  
 matter of the nicest and most difficult discussion.

The slightest circumstance may turn the balance ; probability in  
 the tale, collateral confirmations, or impeachment by other evidence,  
 contrary declarations, tamperings, the confident or modest demean-  
 or of the witness, hesitation, confusion, prevarication, self-contrad-  
 iction, compared with the contrary behaviour : These, and many  
 other considerations, conspire to create ; or destroy, belief ; and, there-  
 fore, the general character of the man is of no great moment in weigh-  
 ing the credibility of his testimony ; for I appeal to experience,  
 whether general character is ever called in to impeach a person’s evi-  
 dence, till some strong attack, from another quarter, is made to his  
 credit ? and therefore, every man, without exception, who is free  
 from all interest in the fact he comes to attest, is a credible witness,  
*i. e.* he deserves credit ; nay, he is always believed, unless some ob-  
 jection, besides character, is raised against his testimony.

Thus much being premised, give me leave to apply this reasoning  
 to the statute before us. Who are those credible witnesses, who are

is in the corporation, and corporators *are always admitted* in such cases !

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In *Newell's case*, which related to certain transactions, called upon to attest ? The answer is plain ; those who are intitled to the general character of credibility ; who are free from infamy, and disinterested ; who can neither get, nor lose, by the will. In this sense, and in this only, can the word possibly be understood, and, therefore, it is so far from being true, that credible is never used as synonymous to competency, that, on the contrary, wheresoever it is considered in the abstract, and applied to the idea of legal witnesses, it must be always synonymous to competent.

It is worth observing here, that credibility is so inseparable to all men who have their senses, that the epithet incredible, is never applied, in common language, to the person, as it is to his testimony. You say a fact is incredible, as well as credible ; but you never say a witness is an incredible person. For there is not any man breathing, who is not capable, though perhaps not worthy, to obtain credit, if you hear his testimony. And, indeed, the true reason why infamous and interested witnesses are rejected, is, for fear they should be believed ; and, therefore, such persons are properly called incompetent, and not incredible, which mode of expression introduced competent in law language, as the opposite, instead of credible.

When the statute, then, requires three *credible witnesses* (for it does not say three *reputable persons*) to subscribe, it requires three disinterested persons, who are not infamous, and no more.

All such are credible to that fact, wherein they have no interest ; this may be pronounced of the worst man, and you can say no more of the best ; for they are both credible as they stand upon the will, though perhaps not in the same degree.

1. The acts which direct convictions to be made upon the oaths of *credible witnesses*, mean *competent*, as I conceive ; and if the witness has no interest, the magistrate ought to convict, if he is not contradicted. This cannot be denied ; and I am sure the reason given why the informer cannot be a witness, is, because he is not credible, which proves pretty clearly, that if he had no interest, he would be credible.

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in which the First Society in Torrington was interested, the members of that corporation were rejected as witnesses, because it appeared, that other persons might be

2. And though Lord COKE, when he advises the testator to call credible witnesses to attest his will, may mean to recommend the most credible, such as are reputable persons, as well as competent witnesses ; yet there is no ground to infer from the expression, that any competent witness, in his opinion, was totally non-credible.

But, if this be the true meaning of the word, then they contend that it is an idle, nugatory word, as being included in witness.

Admit it, for a moment ; must the clause be condemned, or lose any of its weight, because an epithet might have been omitted ? How few laws could escape censure, if any synonymous words should prove them guilty of inaccuracy ? I should rather think, that the contrary ought to be presumed ; because this tautology generally proceeds from abundant caution, the writer thinking it safer to overload the sentence, with many impertinent words, than to omit one material syllable.

But I shall not be satisfied with this apology ; because I apprehend that the word credible, upon further examination, will turn out to be not only proper, but extremely useful, in this place. For, suppose the Parliament had reasoned in this way, while they were settling the clause : The word witness alone, according to the best construction, may perhaps be determined to mean the same as credible witness ; for our intention to protect the testator from fraud, will naturally lead to such a construction. But, suppose some future interpreter, if credible is omitted, should take advantage, from the omission, to expound the law contrary to our intention ; suppose he should argue from hence, that the statute, by adding no qualification to the witness, has shewn that we never meant to provide against fraud, by this attestation ; that, therefore, this part of the ceremony is mere form ; and, that the common law method of dealing with witnesses ought to be adapted to this statute, by which the incompetent witness may be restored, by a release, or payment. I will not say, that this difficulty did actually occur to the penmen of this clause ; but this I can say with great confidence, that they who have thus commented on this clause, in spite of the word credible, would have argued more plausible, if that word had been omitted ; whereas,



had. This decision cannot be reconciled with the principle of a settled practice to admit parishioners, where the corporate interest is concerned.

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now, by the assistance of this epithet, we are sure, from express words, that the witness must be competent, at the time, or else the will is void. Such a word, then, may fairly be deemed both proper and materials if it serve to make a passage clear, which, without it, would be obscure and ambiguous.

Not barely three witnesses, not three competent persons, in a loose sense of the word, are witnesses; not three *Baynham's*, first bribed, by a legacy, to join in the fraud, and then bribed again, by payment, to fix it; but three credible, *i. e.* unattainted, disinterested witnesses.

The words so used, to say no more, strongly mark out the sense of the legislature, and call upon the attention of the Court to that competent qualification of the witness, at the time. In my opinion, therefore, the word has a strong, significant, and forcible meaning.

Neither can I be brought to think the clause so inaccurate, in other particulars, as it hath been described. Some few questions, indeed, have sprung out of it; but they are all questions of subtilty, and such as might have been drawn out of the best chosen words. Pen a clause how you will, there will be always room for liberal construction to enlarge, and rigid construction to restrain; that, and no more, has been done on the present clause. In the formal part, the judges have been liberal; they have gone as far, and perhaps farther, than the words will bear, to establish the will, where the want of formality was only objected.

Sealing shall be signing (*n*); delivery as a deed, shall be publication of a will (*o*); the witnesses may attest at different times (*p*); the presence of the testator shall not be confined to the very room (*q*).

It is beyond the power of penmanship to anticipate such questions;

(*n*) 2 Stra. 764.

(*o*) 8 Vin. Abr. 125. pl. 13.

(*p*) 2 Chanc. Cas. 109.

(*q*) 2 Salk. 688. Carth. 81. 12 Mod. 37. 3 Salk. 395. pl. 1. Comb. 158.

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In July, 1795, the case of *Starr v. Starr*, relating to *Mortimer's will*, was argued. The will contained the bequest of a granary to the City of Middletown, and the

and it must always be remembered, that the rules of construction were framed to supply the defects of human language and capacity. Nor do I think it would dishonor my Lord HALE's character, to be reputed the author of this clause, (which, by the by, he might have been, though he died before the statute passed ; ) for I cannot help subscribing to the opinion of a great Judge, who said that these decisions were rather a reproach to the profession, than to the clause.

If the law is then vindicated from this charge, and if it is, as the legislature has called it, in the very last act, (r) an excellent law, the judges ought to take the utmost care not to weaken the force of it, by a mistaken favour to wills, remembering always, that the legislature meant to prevent fraud, not to multiply wills ; much less ought they to treat the objection to the legatee witness with slight, by calling it form, when the legislature, even in their last act, (s) have unwitnessed the legatee, as such, by annulling his legacy.

This last act has, in effect, considered the legatee as totally incompetent. This last act has, in effect, pronounced, that the testator cannot be safe under such witnesses. This last act, though it has varied the method, has done the same thing, and worked upon the same principles ; and both acts, by different ways, arrive at the same end. The one disables the legatee from being a witness. The other disables the witness from being a legatee. Where is the difference ? Both concur in saying the same person shall not be a witness and a legatee.

I come now to the great leading case upon this point, viz. that of *Hilliard v. Jennings*, which I conceive to be a direct authority to shew, that competent and credible witnesses are the same, and the true reason of requiring three credible witnesses, was to protect the testator from fraud.

The argument on the other side, has taken the report of this case

(r) *The words of the legislature are " which (viz. Stat. 29 Car. c. 3. sec. 5.) hath been found to be a wise and good provision." Preamble to Stat. 25 Geo. 2. c. 6.*

(s) 25 Geo. 2. c. 6.

witnesses were three citizens. The question as to their competency was very particularly discussed ; it was twice argued ; the Court heard the counsel with great pa-

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from *Carthew*, deeming him the best reporter, because he was counsel in the cause, and has not reported the general principle, upon which that case was ruled ; has taken it for granted, that it was ruled upon no general principle, though the other reporters have freely stated the argument at large, together with the grounds of that resolution. This makes it necessary to examine *Carthew's* report with more attention ; and, if I am not mistaken, he will appear to be the worst reporter of them all ; though, at the same time, they will be found to correspond, and be perfectly consistent, when they are compared together.

The words of *Carthew's* reports are :

“ This will was void *quoad* the devise of the lands to the plaintiff, because he being the person to whom the lands were devised, cannot, by law, be allowed to be a credible witness, to prove the execution of the will, on his own behalf ; wherefore, with respect to this devise, the will was attested only by two witnesses, which is not sufficient to answer the statute.” (1)

In order the better to understand this book, give me leave to state the case, and draw the argument of the Court upon the point into a syllogism.

The case stated is no more than this :

The statute requires three credible witnesses to attest, and devise of the lands is one of those three witnesses.

The argument upon which the opinion of the Court was founded, may be thus drawn into a syllogism.

The general principle, or the major of the syllogism :

No person, who would be incompetent to prove a will, upon a trial, can be credible to attest it, upon the execution.

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tience, and, at length, waived deciding upon a question of so much difficulty, and determined the case upon other grounds. But,

This major is proved by other arguments, which I will not repeat, shewing that the statute would be evaded, by any other construction.

The minor :

The devisee, in this case, would be incompetent to prove.

*Ergo*, he is not credible to attest.

Every body knows, that the minor of a syllogism is derived out of the major, which is a general proposition, either self evident, admitted, or proved by the arguments ; and that an argument cannot be perfect without the major.

Now, Mr. Sergeant *Carthew* has reported only the minor, and the conclusion, and has totally omitted the major proposition.

The two last members of the syllogism, in that book, are thus expressed :

The plaintiff cannot, by law, be a credible witness, to prove the will, in his own behalf.

*Ergo*, the will is void, *quoad* this devise.

Thus, he informs you, that the witness' credibility, in this case, is determined by the consideration of his competency at law.

But why that competency at law comes to be the criterion of his credibility under the statute, the book explains not, but leaves that principle, which is the major of the syllogism, to be collected by the reader.

This is one defect in the report. But there is another, which is still more misleading ; and that is, that he has narrowed his conclusion to the very case before him, by saying the will is void *quoad* this devise, and with respect to this devise ; by which emphatical manner of confining his conclusion, he seems to intimate, that the

5. If such a practice has grown up, and become settled, it extends only to cases, where the witnesses are admitted *from necessity*. Thus, questions relative to

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will might be good as to every other devise. Whereas, if he had stated the general proposition, from whence this consequence was deduced, his report could not possibly have been mistaken.

True it is, that when the will comes to be looked into, you see the true reason, why he has laid so much stress upon this specific devise, not because he meant to distinguish a devise to the witness, from any other real devise, in that, or any personal estate; and, as this was the only real devise, he reports the will void in this part, only in opposition to the personal part, wherein the will was good.

Now, let us see the use that has been made of this report, by the argument on the other side.

By omitting the general principle, upon which that case was determined, it has formed that particular decision into a general rule, by which the general principle is contracted to that particular case. The rule is this :

That no witness, by his own subscription, shall take an interest, after the statute, which he could not prove, at that time, by his own examination.

I do admit this proposition to be true, as far as it goes, and to be so resolved by the Court. But, I say, the Court went further, and resolved that no such interested witness could establish any part of the will, but that the whole will would be void, *in toto*, as well as his own particular bequest; so that when it is pretended, that the Court confined the resolution to the particular case before them, and meant to extend their doctrine no farther, I do, with deference, deny this inference, and will prove the contrary from the case itself, as reported by the several authors, and Mr. Sergeant *Carthew* shall not be omitted.

The best way to understand the grounds of the resolution is to state the arguments on both sides.

Sergeant *Carthew's* own argument in favour of the will :

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the commorancy of paupers ; relative to boundaries ; relative to town or society transactions ; disputes between ecclesiastical and school societies ; and many others of

“ 1. The plaintiff is a man of an indisputable credit.

“ 2. Though he cannot be sworn, upon a trial, yet one cannot say but that there were three witnesses to the will ; and the will has been well proved by the other two witnesses.

“ 3. There is a difference between a matter which goes to the credit of his testimony, and a matter which goes in bar of it. The first sort are excluded from being witnesses, by that statute ; as a man attainted of treason, &c. But, where there is only a thing which bars him from being a witness, but does not touch his credit, it is otherwise.

“ 4. The intent of the act was to prevent perjuries ; but this cannot be within the mischief of the statute, because the devisee being a witness, could not be sworn and examined upon it, and, therefore, out of the mischief of the statute.

“ 5. That this statute has been taken with a liberal construction.” (u)

The same argument thus reported by Lord Chief Baron COMYNS : (v)

“ Although the plaintiff cannot be examined as a witness, in his own cause, yet the will being proved by other witnesses, he is a credible witness to the will, although not in this cause ; and there is a diversity between a person who is infamous, and incapable to be a witness at all, and such an one who may be a witness, but, in a particular case, is not allowed to be examined, in respect of his interest.”

Now take the argument on the other side, and the resolution of the Court.

“ 1. Against this, it was argued, by Mr. Pratt, and held by the whole Court, that this will was not well executed according to the statute of frauds. For a man who cannot be a witness, which is

(u) Lord Raymond, 506, 507.

(v) Com. Rep. 91.

a similar kind, all proceed upon the principle of necessity, which creates an exception to the general rule of evidence. But, when the necessity does not exist, as in *Newell's case*, testimony is to be derived from a purer source.

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" the plaintiff's case, cannot be a credible witness. (x) And the intent of the act was to prevent frauds, as well as perjuries ; which intent would be evaded, if the devisee should be admitted to be a witness, who being a party interested might probably be induced to use fraud. And Mr. Pratt said, that the statute appointed three witnesses, &c. to the end that it might be done in such a solemn and notorious manner, that they might see, that the devisor did not suffer any imposition, being infirm as well in understanding as in body, as all men generally in *extremis* are. But, if persons who cannot give evidence of their subscriptions, &c. shall be admitted to be credible witnesses, the intention of the act will be entirely evaded.

" And for this point, the whole Court were of opinion, to give judgment for the defendant." (y)

" As to the other point, Sergeant Pratt argued, and it was held by the Court, that the will was not well executed ; for the plaintiff was not a credible witness, as he himself was to take by the will ; for the intent of the statute was to prevent any practice by persons interested in the obtaining of a will ; and if he who is to take by a will may be a good witness, it will be an encouragement to such practice." (z)

To these I will add a third, which my brother Gould has favoured me with, taken by his father, one of the judges who determined that case :

" By direction out of the Court of Chancery, the question was, whether a devise of Enshall Farm, by *Thomas Jennings*, to *William Hilliard*, and his heirs, be a good devise, he being one of the subscribing witnesses."

" Objection: a good devise, so long as three subscribe and wit-

(x) Freem. 510. 12 Mod. 277. (y) Lord Raym. 507.

(z) Com. Rep. 95.

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It was admitted in the Court below, that if the testator had been at Hartford, and the witnesses to his will had been inhabitants of Colchester, the exception to

“ness it ; for 'tis credible, which is in opposition to a person attainted ; but if two of the witnesses were dead, then, indeed, it “ might be bad.

“ But, resolved for plaintiff, by the whole Court, clearly, that he “ not being credible to prove the will, the devise is a void devise. “ For the design was to set up a credible swearing witness, and this “ to prevent fraud and perjury,”

Several material observations arise from the case thus reported :

1. They do all agree with *Carthew* ; the only difference between the books being this, that the latter report the resolution without the reasons, the others report the reasons, as well as the resolution.

2. The Court took it to be a case of construction upon the statute, and nothing else.

3. They considered the credibility, as well as the attestation, to be the very substance and essence of the business.

4. They ruled credible to be the same as competent.

5. They not only held this necessary to prevent fraud, but held likewise, that if they gave credible any other sense, the statute would be evaded.

And, therefore, the rule of construction, laid down by the Court, was general to annul all wills and all real devises whatsoever, where one of the witnesses was incompetent.

I have done with the first point, and have proved, as I hope, both by argument, and authority, that proposition which I undertook to maintain, viz. That the credibility of the statute meant competency, and that this was a necessary and substantial qualification in the witness, at the time of attestation. Which brings me to the next consideration, Whether the witnesses to this will come within that description ? Being now in possession of the true criterion of credibility, which is no other than competency, this is a mere



their competency would have been well founded. Why? 1802.

Because such witnesses *were not necessary*. And if the  
will is made at Colchester, provided other testimony  
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common law question, and, therefore, I shall produce the witnesses  
in court, and take the objection to them, before they are sworn.

The case is this :

The testator devises certain lands to trustees, to be applied to the  
use of such poor, as, by reason of infancy, impotence, or old age, are  
unable to work, and to place out the children of such poor, appren-  
tices ; and declares, that the rents shall be applied to no other use or  
purpose.

Three witnesses who attested the will, are seized of lands in fee,  
within the said parish, at the time of attestation.

The objection is, that these witnesses cannot be admitted to prove  
the will, in court, while they remain so seized, because, by the es-  
tablishment of the will, they will derive an interest to themselves,  
in respect of those lands.

Their interest is this, that, as the poor's rate must be reduced, in  
proportion to the value of this benefaction, their estates will become  
rate-free, *pro tanto*, forever. And, although the devise, at the time  
of the testator's death, was future, and did not take effect 'till 1740,  
twelve years after, yet it was a present benefit to the owner of those  
lands, and made them immediately more valuable, in consideration  
of this future easement.

I have many arguments here to encounter, both from bar and  
bench. I shall endeavour to answer all, to the best of my power, and  
with all that respect, which their opinions always deserve, where  
we differ.

First, it was said, that the poor here described must be understood  
to be a class of poor just above the necessity of relief, and that this  
charity may be applied, by the trustees, to the use of such persons,  
exclusive of the parish poor. To which I answer, that the poor in  
this will are those who labour under the extreamest weakness of  
helpless poverty. For, when it is considered, that the day-laborer,  
who only lives from hand to mouth, is deemed, by the testator, to be

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might have been had, the cases are precisely similar. The argument, aside from the principle of necessity, would be the same, then, as it now is.

a person above the want of this charity, which is confined to the impotent only, those who have enough to subsist on, without labour, must, *a fortiori*, be excluded.

2. The poor, in this will, are denoted by the same description as the parochial poor are, by the 43. *Eliz.* c. 2. And if this be so, this charity cannot, by the terms of it, be distributed to a set of men, who are excluded by the will ; it will be a breach of trust to do it ; and if it be said that the Court of Chancery can direct the money to be applied to a superior order of poor, I desire a case to be produced, where that Court has ever made such a decree. If a legacy had been given to poor house-keepers, and poor not receiving alms, or to poor in general, there might be, perhaps, some grounds for that distinction. But I can never believe, that the Court could make such a decree in this case ; the business of that Court being to expound wills, and not to make them.

And whereas it is said, that those legacies, when they reduce the rate, come to be, in their operation, legacies to the rich and not to the poor ; I answer, that it is impossible to be otherwise ; and though this is always to be supposed to be contrary to the testator's intention, no man living can be sure of that, and I do much doubt it ; for why may not a man mean, at the same time, to give to the poor, and likewise case the parish ? The poor's rate is a most heavy burden ; it falls upon the tenant and occupier, and is paid by those, who are not above a degree or two richer than the object he is forced to relieve ; so that he, who thus disposes of his estate, is a double benefactor. But be this as it will ; if a gift is made to the parochial poor, it must reduce the rate *ex necessitate*, though the testator may possibly intend otherwise.

My brother GOULD contends, in the next place, with whom my two brothers now concur, that this benefaction should not be considered as an ease to the parish, but as a bounty to be added to the parish relief, for the comfort of the poor, and not for their subsistence.

By the 43 *Eliz.* c. 2. the parish are only taxable for the necessary relief of the poor. Nothing, therefore, but necessity, can call for this relief ; if the party can subsist, by any means whatsoever, with-

Whether there was a necessity or not, is always a *question of fact*. In this case, the fact must come from the defendant. The plaintiffs object to certain persons, on

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out this aid, he is not the object of this law ; nor can it ever be material to consider, from whence the pauper is supplied : if he has wherewithal to subsist, without the parish, the parish must be discharged ; because the relief, in such a case, is not necessary.

And as the necessity of the object is the rule, by which the relief is to be apportioned ; it must be more or less, according to the pauper's condition and circumstances.

If a labourer, who gets seven shillings a week, by his industry, is incumbered with a large impotent family, the parish adds so much to his weekly gain, and no more, than will be just enough to keep the family alive ; if he falls sick, the allowance is increased ; if his children die, or become useful, it is diminished.

One has a little close, worth forty shillings a year ; his stipend will be less than his neighbour's, who has but twenty shillings a year ; and his gain will be less than another's, who has nothing.

This is the true reason why the rate is directed to be made weekly, or otherwise, because the state of the poor is always fluctuating.

An estate, or legacy, is given to the poor. If, in this case, the rate must continue the same, without any regard to this benefaction, you call upon the parish for a superfluity ; for, as far as the rate added to the charity, will exceed the sum necessary for their subsistence, the parish is taxed just so far beyond the sum necessary for their relief, and so contrary to the act of Parliament ; for relief and subsistence are synonymous terms.

This duty upon the parish is so connected with the necessity of the pauper, that if a testator, bequeathing a legacy to the poor, should say, " I mean that the poor should enjoy the same parish allowance over and above my legacy," the clause would be *felo de se*, and void, unless it can be maintained, that he who has something, is as poor, as he who has nothing ; for if he is richer, he wants less relief, and if less relief, a lower rate will do. So that if the legacy takes place, the parish must, of necessity, be eased.

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the ground of *their interest*. This general objection, if unanswered, is *fatal*. If there is any circumstance, that operates by way of exception, the person who would

I have been arguing upon an allowance of money. Suppose a testator bequeaths a legacy to clothe the poor, or an house to receive them, or a sum of money to apprentice out children. Must the parish still clothe, lodge, and bind out as they did before? Or, must they add the value of the clothing, house, &c. to the former allowance, and so give the poor a superfluity above their necessary subsistence? I think that cannot be contended for; and yet a gift of an house or clothing is as much a bounty to this purpose, as a gift of money.

If I suppose in arguing, which I have a right to do, that the charity is ample and sufficient to maintain all the poor, my brother GOULD does not even choose to deny, that the parish, in this case, must be eased; but if it is only a trifle, it is a bounty.

According to what I have said, let it be ever so small, it must operate *pro tanto*. But, if I should, for a moment, admit a distinction, will he be pleased to draw the line? If he can do that, I may venture to promise, that I will come over to his opinion; if he cannot, I think he ought to come over to mine.

Nor can there be any difference between a devise to trustees, and a devise to overseers; the trust is the same in both, and the objects the same; and the parish officers are but trustees, as the trustees, in the application of the charity, are parish officers; the hands, through which the charity passeth, are, in both cases, mere instruments.

Neither is there one case to support my brother's notion, but all the authorities seem the other way; for as often as this question has come before this Court, in the cases of penalties given by parliament to the poor of the parish, the Court has constantly held, that the rate would be reduced by those sums, and every parishioner eased *pro tanto*.

Yet, these are gifts; why not bounties, in many cases more considerable than the present? Upon the whole, this idea of a bounty is novel at the bench, and of the first impression; and when I was prepared to argue the case of *Portman, v. Otreden* upon this ground, the Court of King's Bench would not hear me.

take benefit of it, must produce it. The *necessity*, if any, arises out of the averment, that this transaction was done within the territorial corporation of Colches-

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Where charity was given for the clothing of six poor persons of the Parish of E. Lord Chancellor MACCLESFIELD would not suffer any of the inhabitants of E. to be witnesses, because they were interested, as being eased in the poor rates. (a)

Lastly, what can be said upon the last use in this will, to bind out poor children apprentices? There the parish must be eased, unless they will choose to pay the master double the value.

To proceed now to the remaining difficulties.

The interest is nothing claimed under the will; it is nothing, in present; it is contingent, in future; it is minute.

To the first; it is not given to the parishioners, but it is an interest derived to the parishioners in consequence of the will, the common case of penalties given to the poor: they gain, if the will is established; they lose, if it is set aside.

To the next; it is no easement in present, I do admit; but in respect of future easement, it is now a present and a lasting benefit; and, in truth, (which will answer the next objection at the same time,) all future interests, whether certain or contingent, whether now or hereafter to be enjoyed, are present benefits, have a price, and are saleable.

The Court of Chancery, therefore, have very sensibly pronounced possibilities to be vested interest, and made them transmissible: A fee, expectant upon a thousand years term, has been sold for money. Let me put the case of an executory devise of an estate of 10,000 *l.* a year, and the life before it in a deep consumption; (I am entitled to put the strongest case I please;) could this devisee be a competent witness to prove this will? The answer must be, he could not. Tell me, then, what chances are valuable, and, what not? Till this line is drawn, I must insist that all chances are valuable.

Hence, if it should be said, that perhaps the parish may have no

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ter. (r) Is it, therefore, *necessary*, in point of *fact*? For the law does not predicate necessity in this case. It would be strange if it should. It might happen to pred-

(r) It does not appear, from the record, *where* the will was executed.

poor; I admit the supposition to be possible, and barely so; but if it be only as possible that they may be burthened with poor, every estate that is discharged from this possible burthen, is, in that respect, bettered, and must remain so, as long as the statute of 43 *Eliz. c. 2.* stands unrepealed.

As to the objection, that the interest is minute, and that a small interest, as in *Townsend's case*, ought not to disqualify witnesses.

I do conceive, that however that point might have been litigated formerly, yet now the law is clearly settled, and the witness must be rejected, if he has any interest, be it ever so small.

The point was disputed, for above twenty years, in the case of toll or custom claimed by the City of London, upon importation, called by the name of *water-bailage*.

The question was, whether freemen might be witnesses? Nothing can be more minute than such an interest; and yet, after many opinions *pro* and *con*, it was finally settled, that they were not witnesses.

Any person, who has a mind to trace the history of this question, may find it in 2 *Keb. Rep.* 295. *pl.* 84. 2 *Show. Rep.* 47. *pl.* 33. *Id.* 146. *pl.* 127. 2 *Lev.* 231. *Ventr.* 351.

This last case, and it is the last I can find upon the subject, 32 *Car. 2.* is differently reported in the two books, for one states (b) that three judges (c) allowed the witnesses, and one dissented; (d) upon which the counsel for defendant tendered a bill of exceptions, but the plaintiff gave it up, and called other witnesses.

(b) *Ventr.* 93.

(c) *Viz.* SCROGGS, *Chief Justice*; DOBBEN and RAYMOND, *Justices.* *Ventr.* 351.

(d) *Sir THOMAS JONES.*

icate necessity of a transaction of this kind, passing in the view of a dozen strangers, and within ten rods of the parish bounds, where hundreds of disinterested witnesses

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The other book says, (e) that the freemen were denied to be witnesses, and that the plaintiff tendered the bill.

I cannot reconcile the books, but both agree the witnesses were not examined, and the verdict went for defendant.

What became of the bill of exceptions does not appear; I should guess it was argued, and settled solemnly, that the freemen could not be witnesses, because it is so said by a Lord Keeper, and a Lord Chancellor, in *Vernon*.

1. Lord Keeper NORTH, in 1684, two years after this trial, said "he thought it very hard in the case of *water-bailage* of London, that no one freeman of the City, though it was not six pence concern to him, could be admitted as a witness." (f)

In 1694, Lord Chancellor SOMERS said, "In suit touching the loss and misapplication of a sum of money, given for the benefit of the parishioners, none of the inhabitants ought to be witnesses; for in a case, where a party is concerned in interest, though never so small, the objection has always prevailed; and it was so resolved, upon great debate, in the case of the City of London, concerning the *water-bailiff*." (g)

Upon issue joined upon a prescription for a toll, the defendants produced a witness; the plaintiff objected, that he was a freeman, and so interested; upon which the defendants produce a judgment, in the Mayor's Court, where, upon a *scire-facias* awarded, and two *nihil*s returned, they had given judgment of his disfranchisement: But, upon inquiry, the man said, he was never summoned, and knew nothing of his disfranchisement; therefore, the proceeding being irregular, HOLT would not admit the man to be an evidence, because the judgment in the Mayor's Court may be avoided. (h)

The statute of 3 and 4 W. and M. c. 11. sect. 13. is material for this purpose; for, by that act of Parliament, "In all actions brought in the courts at Westminster, or at the Assizes, for any money

(e) 2 Show Rep. 48, 146. pl. 127.

(f) *Vernon* 254. pl. 264.

(g) *Id* 317 pl. 318

(h) 11 Mod. 225. pl. 20.

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might be had. Necessity is an *inference from facts*, and it generally, nay, always, arises from a display of every necessary fact, from whence to deduce it. Now, no

“ mispent, or taken by church-wardens, or overseers of the poor, the  
“ evidence of the parishioners, other than of such as receive alms,  
“ or any pension, out of such collections, or public monies, shall be  
“ admitted.”

So again, by stat. 1 *An. st. 1. c. 18. sect. 13.* “ In all informations or  
“ indictments, the evidence of the inhabitants of the town or  
“ county in which decayed bridges or highways lie, shall be ad-  
“ mitted.”

Which acts shew, that the rule to reject the witnesses, for minute interest, could not be broke in upon, by less authority than an act of Parliament.

‘There is a case in *Viner*, (i) where it is said, that “ In information  
“ by Attorney-General, at the relation, &c. on behalf of themselves  
“ and all inhabitants of the Town of Warwicke, &c. relating to  
“ charities, &c. a person an inhabitant receiving alms is no witness ;  
“ for every inhabitant either pays, or is under a possibility of paying,  
“ to the church, poor, &c. though he pays nothing at present.”

If the rule be so, it must prevail as an objection to all witnesses, without exception ; and there can be no difference between witnesses to a will, and any other ; I say this, because I see a practice had prevailed to admit will-witnesses, where the legacy was small.

In the argument of the *water-bailage* case, it is said, that “ a small legatee has been sworn to prove a will,” (j) and that it had been usual. (k)

And Lord NORTH is made to say, “ it was usual where a man was a legatee, if it was an inconsiderable legacy, as five shillings (or five pounds to a man of quality,) that he should nevertheless be a witness to prove the will.” (l)

(i) 12 Vin. Abr. 18. pl. 19.

(j) Vintr. 351.

(k) Sir Bartholomew Shower, (who reports same case, by the name of the King against Carpenter,) his words are “ hath sometimes been allowed a witness to prove a will.” Show. Rep. 47. pl. 33.

(l) Vern. 254.



principle is clearer than this, that a court of law cannot find a fact, unless it is directly averred, or unless it results by necessary inference ; neither of which appears in this case.

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It is plain there had been such a practice ; and I take it to be upon that ground, that the parishioner was allowed to be a witness in *Townsend's case* ; but that practice ceased, I believe, upon the statute of frauds.

But, I take it most clearly, that this notion is now exploded ; and, therefore, if it shall be once admitted, that the parishioner in *Townsend's case* had an interest under the will, the case neither is, nor can be law, till it can be proved, that a legatee of a *small sum* may, at this day, be a witness.

True it is, that the interest of the witnesses in some cases, is drawn so fine, that it is scarcely perceptible ; and yet that glimmering, that *scintilla*, shall be as powerful to exclude the witness, as the most substantial profit ; and I have always understood, that case (*m*) to be good law, where the Court set aside the witness, because he thought himself bound in honour to pay the costs of the suit.

The true ground whereof is this, which is fit to be attended to, in every part of this branch of the argument ; that as no positive law is able to define the quantity of interest that shall have no influence upon the minds of men, it is better to have the rule inflexible, than permit it to be bent by the discretion of the judge.

THE DISCRETION OF A JUDGE IS THE LAW OF TYRANTS ; IT IS ALWAYS UNKNOWN ; IT IS DIFFERENT, IN DIFFERENT MEN ; IT IS CASUAL, AND DEPENDS UPON CONSTITUTION, TEMPER, AND PASSION. IN THE BEST, IT IS OFTENTIMES CAPRICE ; IN THE WORST, IT IS EVERY VICE, FOLLY AND PASSION, TO WHICH HUMAN NATURE IS LIABLE.

I have done with this part of the case, and return again to the statute of frauds, and the next point, which is, whether a witness, not credible at the time, can become so, by matter *ex post facto*, so as to re-establish the will.

(*m*) It is reported in Stra. 129.

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Further, in a large town, through which hundreds are daily passing, such necessity cannot be presumed to exist.

Again, the *time* and *place* of execution were, in no

If my construction is right, the will, upon the attestation, is, *ipso facto*, void, by the very words of the statute.

THE TESTATOR HAS BEEN BETRAYED; THE FRAUD IS COMMITTED; AND YOU MAY AS SOON RECAL TIME, AS MAKE THAT TRANSACTION HONEST, WHICH WAS ORIGINALLY FRAUDULENT; NO PURGATION CAN CLEANSE THE WITNESS.

I say, if I have construed the statute right, *every such attestation is a conclusive mark of fraud* upon the will, against which no evidence can be given; and though it has been said, that a legacy is no present interest, and that the legatee does not know the contents of the will; I answer, that if it shall be once held, that such a will may be established by the legatee's release, every legatee, who intends a fraud, will always, for the future, be sure of the contents, before he attests.

But still, it is argued, that if you pay or release the legatee, he is a good witness; his bias is gone; the will shall be established.

It is difficult to say, whether this doctrine is more pregnant with mischief, or absurdity.

1. It furnishes the will-maker with bribes to the witnesses, out of the testator's own estate, to deceive himself, and disinherit his heirs; nor is it possible to give the witness a stronger security for his legacy, than by making him a witness, because, by this means, his release being necessary, he gains a power over the whole will. Thus, the law co-operates with the fraud, in requiring the devisee to pay the witness his hire before, under the penalty of setting the will aside, if he refuses.

But the mischief will not stop here; the legatee will naturally proportion his demand to the value of the estate bequeathed; and will frequently exact more than his legacy.

Nay, he will think it worth his while to hold himself out to the

respect, *necessary*. For aught that appears, the will might have been executed at any other time, and at a different place, where disinterested witnesses might ea-

heir, and keep the will in suspense, till the one or the other is brought to his price, and thus the testator's lands, after his death, *will be sold, by the witness, to the highest bidder.*

To day the will is bad, for the legatee will not release; to-morrow the legatee is satisfied, and the will is good: The heir at law recovers in one term, and he is disinherited in the next.

In this state of uncertainty the will must remain, till the legatee is pleased to pronounce its fate.

But suppose the witness should die before he has released; nay, put the case, that he dies before the testator; is the will good, or bad? If good, he is a credible witness, and needs no purgation; if bad, he is not credible, and incapable of it.

Again, let us suppose the witness convicted of some infamous crime, can the Crown restore the will by a pardon? In that case it depends upon a casualty, and the King disposes of the estate.

Among all the difficulties, one might have expected some rule would have been laid down to fix a certain period for the establishing or annulling of the will, by telling us how long the incompetency of the witness was to violate the instrument; for it is impossible to conceive it could remain in this state of fluctuation forever.

I have endeavoured to find out this point of time, from the argument on the other side, without success. It is said, indeed, that the time of examination could not possibly be the criterion, on which the will was to depend; because the witnesses might not live to be examined, and their incompetency might arise long after their signing. I do not clearly conceive, that this cannot be the criterion. The only fixed period remaining is the time of attestation; but the whole argument on the other side is brought to prove, that that point of time cannot be the criterion; so that both these periods being excluded, it doth behove the counsel for the defendant to point out some other; but the argument is silent, and the will is left, at last, after so much pains, to float upon that sea of casualties I have been describing.

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sily have been procured. It was a *premeditated* transaction, of the highest importance.

There are peculiar and weighty reasons, why the wit-

The common received usage, with the opinion of eminent practitioners, has been called in aid, and they have been named; Mr. *Fazakerly*, and Sir *Thomas Bootle*. They are great names, and I have an high regard to their opinions. The general practice, too, of the Hall, is always a weighty argument, and should never be slighted. I don't find that this practice, as it is called, ever went beyond the cases of money legacies, which sprung up, as I guess, from the practice in the Spiritual Court, where a release, to this day, will make the witness. But it is not pretended, that this practice ever prevailed so far, as to admit a release, or payment, to restore the witness, where he was a real devisee; so far from it, that *Hilliard v. Jennings* passed always for law, without a murmur; and it was not till after the true principle of the statute of frauds came to be thoroughly discussed and settled, in the case of *Anstry and Dowling*, that those practitioners came to be alarmed. Then, indeed, their eyes were opened, and they begun to fear, that if the Court of King's Bench was right, the practice and their opinions were erroneous; but as the principle was stubborn, and would not yield to any exception, the legislature very properly took it in hand, and has, with great wisdom, cured the evil, without weakening the statute of frauds, which no court of justice was able to do.

But if those points fail, the defendant's counsel resort to another, which will, at once, solve all difficulties; and that is, that the witness, notwithstanding the objection, may still remain a good witness, to every other devise but his own.

If this be done, it will be a method of setting up the will, by annulling the legacy; for a legacy that cannot be proved, is the same as no legacy at all; it is a nullity; it does not exist: *de non apparentibus, et de non existentibus, eadem est lex et ratio*.

This, I do admit, will solve all difficulties at once, and will render the legatee as safe and disinterested a witness, as if he had no legacy.

And if this had been the law, it would have saved the legislature the trouble of a new act; for it is the very method which the Par-

nesses to wills should, beyond all other witnesses, be impartial and disinterested. They are to exercise a *judicial discretion*. They are to *try* the sanity and free-

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liament has now taken, who, by making the devise void in this case, has disabled the witness from being a devisee; and this has effectually cured every difficulty, and removed every mischief.

It remains, then, to be considered, whether the attestation of a legatee before the act of 25 G. 2. c. 6. made his legacy absolutely void; for I must insist upon it, that he can never be a credible witness to any part, upon any other ground, than the original nullity of his own legacy; if the legacy is not void, then this interest attaches at the very instant of the attestation, and vitiates the whole will forever, unless the fact can be purged afterwards, by release.

Now, that the gift or legacy is void, I do beg leave, with great deference to other opinions, to deny.

In all those cases, if I am not mistaken, the only reason why the witness is rejected, is because his legacy is good.

Consider the case of a will before the statute; if attested by the legatee, it was not void in its creation; it was only held back from operating, from defect of proof; and, therefore, the moment the proof was opened, either by payment or release, or if the will could have been proved by other witnesses, though the devisee was one, the will came forth a valid instrument, to all intents and purposes.

Thus, if the common law rule could be adapted to the construction of this statute, it would not make the devise void, but get rid of it by payment, allowing it to be good. And, indeed, this analogy did prevail so strongly, that it grew to be a common opinion, that where a legacy only was given to a witness, though charged upon the land, a release would do the business.

Again, that the legacy was not void by the attestation, is further proved, by the last act of Parliament, <sup>(n)</sup> which does not confirm any former will liable to the objection, till the legacy is either paid, or tendered. Whereas the same act declares, that in all such wills, for the future, the legacy shall be void.

(n) 25 G. 2. c. 6.

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dom of mind, of the testator. They are called in, at a critical moment, to guard and protect him. They should, therefore, be superior to every exception.

It is from hence observable, that though the legislature avoided giving any opinion upon this litigated question upon the statute of frauds, yet they declare, in the strongest manner, that the legacies so given to the witness were not void, and that it required a new law to make them void, for the future.

Let me add to this common opinion of the bar, so much relied upon, in the former part of the argument, that the legacy was so effectual to disable the witness, that nothing less than a release would enable him to prove the will for any body's benefit.

I wonder a little, why so much pains are taken in the argument to establish the practice of releasing, if the legacy was a nullity, and wanted no release; for if this last was law, that method was not only nugatory, but unjust; and the Parliament must be charged with the same injustice in directing so many void legacies to be paid. But if I have expounded the statute right, where a devisee is a witness, the whole will is fraudulent *ab initio*, and it cannot be otherwise.

The publication is one entire transaction; the will is one disposition of the testator's estate to several persons; the bequests are settled and apportioned by a comparison with each other; and if you garble the will, by taking out particular bequests, you vary the testator's intention in the remainder, and his whole will is maimed.

In case of fraud, for the argument must always remember, that these were cases which the statute intended to prevent; the witness gets the legacy by the merit of attesting the other bequests; (for the grand devisee will hardly ever be a witness) and it is by the other part of the will, that the heir is generally undone; so that the remainder of the will, which the legatee is to establish, is ten times more than that part, which is to be annulled.

Let us see how this point stands upon the cases.

*Hilliard v. Jennings*, is said to be an authority, and so proved in *Baugh v. Holloway*. (o) And there is an expression in *Carthew's* report of the case, that seems, in some sort, to favour the doctrine.

*Edwards*, (of New-Haven) and *Daggett*, for the defendant in error, contended, that even in the courts at Westminster, the will would be adjudged properly wit-

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I have, in the former part of my argument, examined that case so fully, that it will be sufficient here to observe, that this point was neither resolved, nor argued, nor hinted at, in *Hilliard v. Jennings*; and it was impossible that the point could arise upon that will, which contained only one single bequest of real estate.

If that be so, as it is, it would have been a most extraordinary thing, if the Court had spontaneously taken upon themselves to settle this important point, tending to no less consequence than a virtual repeal of the statute of frauds; it would have been strange I say, to have done this, without a case, or a reason, to support it, when the point too was collateral to the question before them, and neither touched by their counsel, nor argued by themselves.

I don't wonder Sir *Robert Raymond* should argue, as it is pretended, for his fee; the bar is apt to argue in that manner; nor do I wonder the Court should, in so stale a business, send the plaintiff to law. But, I can by no means conclude, that because the case never came back, that the heir at law gave up the point. Why might it not end by compromise? I could make twenty conjectures, that should all account for the discontinuance of the cause more probably than that; but it is not worth while, because if the heir at law had really given up the point, his concession would not weigh a hair in the argument.

I have now gone through the argument, and will close with declaring, that I will take no notice of any part of the civil law learning that has been brought into this argument; Lord Chief Justice *LEE* did not ground his opinion upon that law; he did not argue from it; he did not rely upon its authority. I am favoured with a very correct note of his opinion from my brother *ADAMS*, where, after he had fully argued the case, without taking any other notice of the civil law, than to declare that *Swinburn's* law upon legacies cannot be applied to land devises, and to observe, in the same place, that both laws concur, in rejecting interested witnesses.

He concludes in these words:

“ Upon the whole, *conditionem testum cum signarent, inspicere de-*

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nessed. All the cases cited, in which the witnesses were deemed incompetent, are, where they received property, or were discharged from the payment of rates or taxes, or relieved from other burdens. Here, the society was merely a trustee. No fee simple was conveyed to the individuals. They received nothing by this will, which they could sell, or devise, or which could be descendible to their heirs. No part of the property could be taken for any other purpose ; nor did it appear, that the corporators were permitted to educate their children, at this school, *free of expence* ; or that it was not to be open to every body, as well as to the inhabitants of that society. The witnesses might not wish to educate their children there. They might, indeed, be biassed in favour of the will ; but they were only remotely, or contingently, interested. They cited *Townsend v. Row*, (s) *Wyndham v. Chetwynd*, (t) and *the King v. Prosser*. (u)

(s) 2 *Sid.* 109. (t) 1 *Burr.* 421. (u) 4 *Term Rep.* 17.

“ *benus* ; and, as that is to be considered as intended to prevent any “ fraud being used, at a time when testators are most of all liable to “ be imposed on ; and as all people have it in their power to get dis- “ interested witnesses ; we think this will is not well executed, ac- “ cording to the statute ; but is void, as far as it concerns lands.”

This is enough to shew, that Lord Chief Justice LEE never meant to introduce the learning of the civil law into this question ; the rule is mentioned by way of ornament, not argument ; because it happened to express his own common law opinion, in a matter, where he conceived both laws concurred.

I am not wise enough to determine which of the two laws is most perfect, the Roman, or the English. This I know, (which is enough for a judge) that although almost every country in Europe hath received that body of laws, yet they have been, with a most stubborn constancy, at all times, disclaimed, and rejected, by England. For which reason, (and not through any disrespect to the argument I have been endeavouring to answer) I choose to lay aside all that learning, as not being relevant in Westminster Hall.



They urged further, that in this State, *in all cases*, the inhabitants of corporations have been admitted as good witnesses. They cited the case of *Sanford's will*, decided in 1779, where the parishioners of Amity Parish, in Woodbridge, were admitted as witnesses to prove the sanity of the testator, and that he was not under any undue influence, though the will contained a devise to said parish.

BY THE COURT,

The judgment was affirmed.

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The first of these is the fact that the United States is a young nation. It is only about 150 years old, and has not had time to develop a long and varied history. The second is the fact that the United States is a large nation. It covers a vast area of land, and has a large population. The third is the fact that the United States is a diverse nation. It is made up of many different peoples, and has a wide variety of cultures and customs. The fourth is the fact that the United States is a powerful nation. It has a strong economy, a powerful military, and a large influence in the world. The fifth is the fact that the United States is a free nation. It has a long tradition of freedom, and its people enjoy many liberties. The sixth is the fact that the United States is a democratic nation. Its people elect their representatives, and they have the right to change their government. The seventh is the fact that the United States is a peaceful nation. It has never been at war with itself, and it has been at war with other nations only a few times. The eighth is the fact that the United States is a progressive nation. It has been at the forefront of many important movements, and it has made many important discoveries. The ninth is the fact that the United States is a hopeful nation. Its people believe in a better future, and they are working to make it a reality. The tenth is the fact that the United States is a proud nation. It is proud of its history, its people, and its achievements.

The United States is a nation of many firsts. It was the first to declare independence from a European power. It was the first to adopt a written constitution. It was the first to abolish slavery. It was the first to send a man to the moon. It was the first to win a world war. It was the first to become a superpower. It was the first to lead the world in many other important ways. The United States is a nation that has made a great contribution to the world, and it will continue to do so in the future.

A young nation  
with a long history  
of freedom and  
progress.

# *The Supreme Court of Errors,*

HOLDEN AT NEW-HAVEN, IN JUNE, 1803,

CONSISTED OF

HIS EXCELLENCY JONATHAN TRUMBULL,

GOVERNOR,

HIS HONOUR JOHN TREADWELL, LIEUTENANT-

GOVERNOR,

HONOURABLE OLIVER ELLSWORTH,

HONOURABLE WILLIAM HILLHOUSE,

HONOURABLE JOHN CHESTER,

HONOURABLE ROGER NEWBERRY,

HONOURABLE AARON AUSTIN,

HONOURABLE DAVID DAGGETT,

HONOURABLE JONATHAN BRACE,

HONOURABLE NATHANIEL SMITH,

HONOURABLE JOHN ALLEN,

HONOURABLE CHAUNCEY GOODRICH,

HONOURABLE WILLIAM EDMOND, and

HONOURABLE ELIZUR GOODRICH,

ASSISTANTS.

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Hempstead v. Bird.

1803.

In the Court below,

ROBERT BIRD, HENRY M. BIRD, and BENJAMIN SAV-  
AGE, *Plaintiffs*; JOSHUA HEMPSTEAD and JOHN  
INNES CLARK, *Defendants*.

**T**HIS was an action of trespass, in which the plain-  
tiffs set out their right to the ship *Ocean*, by virtue of a  
conveyance from *Gurdon I. Miller*, in the nature of a

A protest is  
inadmissible  
evidence in  
chief.

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bottomry bond, during a voyage from New-York to New-London, and thence to London. While she was at New-London, taking in her cargo, the defendants took possession of her, and detained her thirty days.

On the trial to the jury, on the general issue, the plaintiffs offered in evidence a protest, made at New-London, by the master and mate of the ship, before a notary public, soon after the defendants took possession, stating, that they were put on board, as master and mate, by one of the plaintiffs; that they took in her cargo at New-London, and were ready to sail; and that *Hempstead*, one of the defendants, as constable, attached and detained the ship and cargo, by virtue of an attachment in favour of *Clark*, the other defendant, against *Gurdon I. Miller*. The defendants objected to the admission of this protest, because the vessel and cargo were attached in the harbour of New-London, and not on the high seas; and because it appeared to have been calculated as evidence to support this action, and was drawn up by the plaintiff's attorney, after he was retained therein. This objection was overruled, by the Court; and, a verdict being found for the plaintiffs, the defendants filed their bill of exceptions.

*A. Spalding*, for the plaintiffs in error.

*Daggett*, for the defendants.

BY THE COURT. The judgment of the Superior Court is reversed, because of the admission in evidence of the *protest*; no other question arising upon the bill of exceptions being determined in this Court.

A protest is inadmissible evidence in chief. It may

be read to contradict the evidence, which the captain, who made it, may have given at the trial; but under such circumstances only. (a)

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A protest, regularly, proves itself, and nothing more; or, in other words, that the captain protested against the acts and wrongs, by which himself and the concerned are affected. But it is no evidence to prove, that those acts and wrongs were done; nor to prove what were the rights of any person, who claims those acts to have been injurious to him. In this case, it does not appear, that the captain or mate had testified in the cause; or that the fact of a protest having been made was drawn in question. The protest was, therefore, clearly not admissible evidence in the cause.

(a) *Per Lord KENYON. 2 Esp. Rep. 490. Christian v. Coombe*

## Punderson v. Brown.

In the Court below,

ELIJAH BROWN, *Petitioner*; EBENEZER PUNDERSON, JAMES ALLYN, and EBENEZER PUNDERSON, jun. *Respondents*.

**T**HIS was a petition in chancery, praying for liberty to redeem certain lands.

The facts, as they appear on the petition, and in the decree of the Court, are, that on the 1st day of October, 1785, the petitioner mortgaged the lands in question to *Jeremiah Halsey and John Bellowes*, to secure the payment of 92*l.* 2*s.* 9*d.* lawful money, by the 1st day of

An execution may be levied upon an equity of redemption as real estate, and the creditor, after having the same appraised and set off to him, under the statute, acquires all the rights of the mortga-

gor in the premises. The mortgagor cannot afterwards redeem.

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April then next ; that on the 5th of January, 1786, *E. Punderson*, senior, levied an execution, in his favour, against the petitioner, on the mortgaged premises, and procured the equity of redemption to be regularly set off to him, at the appraisal of 42*l.* 10*s.* in part satisfaction of the execution ; that nine acres, part of the premises, had been, before this time, sold for taxes, and sundry other taxes were then due ; that, in July, 1786, *E. Punderson*, senior, paid all those taxes, the time given, by law, for the redemption of the nine acres being not then expired, and received a deed of release from the purchaser ; that on the 6th of February, 1787, said *E. Punderson*, senior, conveyed, by deed, with covenants of seizin and warranty, the premises to *E. Punderson*, junior, and on the 12th of March, 1787, *E. Punderson*, junior, paid to *Halsey* and *Bellows* the whole of the mortgage money, and took an assignment from them of all their right, title, and interest to the mortgaged premises ; that, on the 1st of April, 1787, *E. Punderson*, junior, entered upon the premises, and received the whole rents and profits thereof, till the 6th of March, 1796, when he sold and conveyed the same, by deed, to *James Allyn*, who was in possession thereof, taking the whole rents and profits, from said 8th of March to the date of the petition.

The Superior Court, by a committee, stated an account of the premises, and the rents and profits, on the one hand, and of the monies advanced, the interest thereon, and the betterments of the lands, on the other, from which they found a balance due from the petitioner of \$376 81, and thereupon decreed a redemption of the premises in favour of the petitioner, upon the payment of that sum, within a given time.

The only question in the case, before this Court, was, whether this estate be a redeemable estate ?

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*Halsey*, for the plaintiffs in error, contended, that the law of Connecticut authorizes the levy of an execution upon the equity of redemption, it being a property of value ; that, being real property, it must be appraised, as other real property ; and that, when appraised, and set off, the fee-simple passes to the creditor, as in other cases of levy on real estate, and from that time is not redeemable.

*A. Spalding* and *Goddard*, for the defendant in error, contended, that a levy of an execution on mortgaged premises, creates only a lien, and the creditor is considered only as a second mortgagee, and liable to have the estate redeemed, upon all the incumbrances being paid ; that our statute describes the property liable to be taken on execution, as that which a man holds in his own right, in fee ; and that, if appraisers set off in fee, they must necessarily settle many important questions, such as the amount due on the mortgage, taking into view the rents and profits, betterments, payments on the mortgage, &c. They must also decide, whether the deed be not a forgery, usurious, or fraudulent ; and thus exercise the powers of a court of chancery and of law.

The judgment of the Superior Court, treating this as a redeemable estate, was reversed, unanimously.

BY THE COURT. The facts respecting the taxes, and the nine acres incumbered thereby, may be laid out of the case ; because, first, it does not appear by the decree, that the appraisers knew of this incumbrance, and if they did not, the petitioner has sustained no injury ; but, sec-

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ondly, if this incumbrance was considered, still it cannot affect the case, for the nine acres had become irredeemable, the purchase money not having been paid, by the petitioner, within the time limited by law.

The only question, then, is, whether, under the circumstances of this case, there was any right in the petitioner to redeem, the equity of redemption having been taken by *Punderson's* execution, and transferred to him?

It was argued by the counsel for the defendant in error, that an equity of redemption cannot be taken on an execution, for that the statute (a) authorizes a levy on "all lands and tenements, belonging to any person, in his own proper right, in fee," &c. To this it may be answered, that the policy of our law is, that every species of property should be responsible for the payment of debts; and that, if the construction contended for should prevail, no estate for life, or years, could be subjected; yet the practice is otherwise. But the estate, which a mortgagor has in the mortgaged premises, is real estate, and often of great value. It descends to heirs, under the statutes of distribution, and does not go to executors; it passes by words in a devise, which pass real estate; and it is ever considered as such in substance, though, technically speaking, the legal right is in the mortgagee. It may be added, that it would operate great injustice, to give this statute a construction, by which equities of redemption should be exempt from liability to the payment of debts; nor have the Superior Court, it is believed, ever admitted such a construction.

The principle, therefore, adopted by the Superior



Court, in passing this decree, must have been, that the levy of an execution upon an equity of redemption, in every case, operates like a second mortgage ; and, of course, that property thus taken is redeemable from the execution creditor. This is not a legal principle.

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In examining this principle, the statute must govern ; since the right to take lands by execution is given by the statute. After describing the proceedings to be had under an execution levied on land, the legislature declare, “ and all executions, levied upon such houses and “ lands, being, with the return of the officer thereon, recorded in the records of lands, in the town wherein “ such houses or lands are situate, and also returned into “ the clerk’s office of the court, out of which the same is “ sued, and there recorded, shall make a good title “ to the party, for whom they shall be taken, his heirs “ and assigns, forever.” It is undoubtedly a fair construction of this act, that whatever interest the debtor had, should, by the levy, become vested in the creditor. But the principle adopted by the Court, in this case, transfers to *Punderson* a mere redeemable interest, or a mortgage, which is personal estate. The equity of redemption, however, in *Brown*, the petitioner, was a thing totally different, to wit, real estate. Their principle leaves *Punderson* still a creditor, and *Brown* a debtor, to the amount of the 42*l.* 10*s.* and the execution entirely unsatisfied. Indeed, the creditor has obtained only a lien on the property, which may be removed, by the payment of the debt. The appraisal is, therefore, idle. But such ideas are not suggested by the statute, and, therefore, cannot be supported. To the argument of the counsel for the defendant in error, that if the levy of an execution be not treated merely as a second mortgage, it will follow, that the appraisers may be obliged to decide many very

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important questions, it may be replied, first, that appraisers of land upon executions, according to the universally acknowledged construction of the statute, may be obliged to decide very nice and interesting questions; as where the fee is levied upon, and it is incumbered by a tenancy by the curtesy, or dower, or other life estate, or by a tenancy for years. Questions may here arise, as to the value of those incumbrances, or whether the instruments, by which they were created, are usurious, fraudulent, or forged, or as to the legal effect of those instruments. So, in case the estate of the mortgagee should be levied upon, the appraisers may be obliged to decide, also, as to the validity of the deed, and the amount due, rents and profits, betterments, &c. as circumstances may require. But, it will be difficult to see how such a levy should operate as a second mortgage. It is not here asserted, that the interference of a court of chancery may not be proper, in a case, which may be imagined. An appraisal may be made under a misapprehension respecting the amount of the debt; the quantity, quality, or title to the property, and in many other ways, when the aid of chancery may be necessary to the attaining of justice. But none of those embarrassments occur in the case before us; for, secondly, the petition and decree shew, that no difficulty here existed; the appraisers had no question, but the most simple, to settle; the amount of the incumbrance was the debt due to *Halsey* and *Bellows*; there were no rents and profits, or betterments, to be adjusted, for the mortgagor had remained in possession. When the value of the land was ascertained, and the principal and interest of the debt due to *Halsey* and *Bellows* deducted, the residue was the value of *Brown's* equity of redemption. This paid only a part of *Punderson's* execution. Why, then, did not this levy take the whole interest of *Brown*, and, consequently, his right to redeem?

The legal estate is vested in *Punderson*, by contract ; the equity of redemption, by operation of law, is transferred to him ; and the legal and equitable interest being gone, what has *Brown* left ? Had *Brown* released his equity to *Punderson*, surely the whole interest would have been vested in *Punderson*. It is as effectually done, by the levy, in pursuance of the statute, as it could have been, by deed ; and with no safety can the Court adopt any other principle.

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Suppose A. mortgages to B. land worth \$1000 to secure the payment of \$500. C. has an execution against A. for \$500, and levies it on his equity of redemption, and procures it all set off to him. In this case, B. can foreclose A. and C. C. can pay B. \$500, and become vested with the whole. In the cases put, suppose C.'s execution is \$250, and it is levied on an undivided interest in the equity of redemption, in the proportion that 250 bears to 500. If C. should purchase B.'s mortgage, can A. redeem from C. paying \$750 ? He cannot ; for the property levied upon is irredeemable, and C. has a right to an undivided fourth part of the whole property, subject only to be foreclosed by the mortgagee, or his assigns.

For these reasons, it appears to this Court, that *Brown*, in this case, had no interest in the mortgaged premises, after the levy of *Punderson's* execution ; and, therefore, that the judgment of the Court below, permitting him to redeem, is erroneous.

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## Ross v. Bruce.

In the Court below,

ARTEMAS BRUCE, *Plaintiff*; EBENEZER ROSS, *Defendant*.

A person injured by a forged note, though the note was not forged in his name, may have an action, on the statute, for the forgery.

An action on the statute, to recover damages for a forgery, is not barred, in one year, by the statute of limitations.

Evidence that a note is in the hands of the defendant, and that it was forged, is admissible, without producing the note.

In such case, it is unnecessary to give the defendant notice, in the declaration, to produce the note.

THIS was an action on the statute "for the punishment of certain atrocious crimes and felonies," (a) alleging, that the defendant, in September, 1799, had forged a certain note, payable to himself, in the name of *Jonathan Sanger*, in imitation of a genuine note, by which an estate, which the plaintiff had purchased, was encumbered; and that the defendant, knowing that the plaintiff had obligated himself to pay said genuine note, presented said forged note to him, and demanded payment thereof. The action was commenced in November, 1800.

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On trial to the jury, on the general issue, the plaintiff offered witnesses to prove, that the note charged to have been forged was in the hands of the defendant, and by him withheld; and then to prove, that the defendant had forged it. The defendant objected to the admission of this testimony; and the case was thereupon taken from the jury, and reserved, on the question of evidence, for the whole Court, at the succeeding term. The Court overruled the objection, and, the case being again brought before the jury, admitted the witnesses. A verdict was found for the plaintiff; and the defendant filed a bill of exceptions, and moved in arrest, for the insufficiency of the declaration.

*A. Spalding* and *Hosmer*, for the plaintiff in error, contended,

1. That, by the statute, the "*party injured*" by the forged instrument has alone the right of action ; and as this note was not forged in the name of *Bruce*, he was not a *party* within the meaning of the statute.

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This statute being highly penal, as it subjects the offender to double damages, and forever disables him to be a witness or a juror, (*b*) it ought to be construed strictly.

When the word *party* is used with reference to a suit, it denotes the nominal plaintiff or defendant. The person beneficially interested may be *privy*, but he cannot be a *party*. Thus, the constitution of the United States, our own judiciary act, and other statutes, our books treating on evidence, and common parlance, all concur in denominating those parties, between whom *nominally* there are suits. When we speak of parties to deed or note, we mean the persons *named therein*. The parties spoken of, in the third paragraph of this act, are those "who are parties to a false deed, or other writing." No person is a party to a deed but the *grantor* and *grantee*; to a bond, but the *obligor* and *obligee*; to a note, (not negotiable) but the *promiser* and *promisee*. *Bruce*, then, was not a party to the note, within the common meaning of the word. In the next place, he was not a party within the fair meaning of the statute. A collateral surety, or a surety to an officer, is not a party to the original action, or to the *cause* of action. The law is satisfied, if the *immediate party* may be protected by suit, not the remote *privy*.

Further, if the *privy* could ever be included in the

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word *party*, it cannot be the case, in this instance. That would put it in the power of the *nominal party* to make as many privies as he pleased, and to give them all a right of action against the wrong-doer. Such a construction of the words is too loose for a matter *civil*; *a fortiori*, for a matter *penal*.

2. After the lapse of one year from the forgery, and demand of payment, no suit can be sustained *for the offence*, in behalf of the party injured. It is indisputably true, that a *criminal prosecution* for forgery is limited to one year: (c) Is there no limitation to the action in behalf of the party injured? The defendant, if convicted, is not only subjected to double damages, but is deprived of his most valuable privileges. It would be monstrous to say, there is no limitation.

Again, does he not fall within the *reason* of the law? Are not the difficulty of defence, and the final consequences, substantially the same, as if the prosecution were criminal? But there is no limitation, except the statute cited furnishes it.

Further, in the statute concerning *theft*, (d) treble damages are given; and is there a doubt but that there is a limitation?

The words of the statute are broad enough to limit the action: "No person shall be complained of, or compelled to answer before any court, &c." The action in this case, is "a complaint," and the defendant is "compelled to answer." The *proviso* satisfactorily shews, that the words in the first paragraph extend to *penal suits*, by ex-

(c) *Stat.* 273; (d) *Stat.* 413.

cepting the operation of it from being a hindrance to "any person aggrieved or injured, by any wrong done to him." This construction, while it protects the defendant from the penal effects of the statute, prevents not his suing at common law, as before.

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3. The Court were not authorized, on the trial, to admit proof that the note was in the hands of *Ross*, and then that it was forged, without notice to him, in the declaration, to produce it. The English practice is clear on this point, (*e*) and ours should be the same. It proceeds on the ground, that the best evidence, the nature of the case admits of, shall be produced. The writing, then, (the best evidence) you shall offer; and, if possible, you shall bring it before the Court. If in the hands of the defendant, he may neglect to bring it; and a trial, when commenced, is not to be broken off, to give him an opportunity of producing it. You shall give him *notice*, that it is required. This rule is founded in the highest reason. It is designed, if possible, to compel the production of the best proof. It gives fair intimation to the defendant; he cannot say, that he is surprised.

*Goddard*, for the defendant in error, contended,

1. That *Bruce* was a *party*, within the meaning of the statute; and that he was *injured*, because this note was an incumbrance on an estate, which he had purchased, and he had agreed to pay the same.

2. That the limitation mentioned, relates to a prosecution, where a *fine goes to a public treasury*, which is not the case here.

(*e*) 1 *Esb. Rep.* 50, *Cowan v. Abrahams*. *Peake's Rep.* 165, *Shaw v. Murkham*. *Peake's L. Ev.* 70, 71. 63.

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3. If the forged instrument be in the hands of the defendant, the plaintiff cannot produce it, and may, therefore, give other evidence of it. (*f*) The Court will see, on the trial, that the defendant is not *surprised*, of which, however, there can be little danger in such cases.

BY THE WHOLE COURT,

The judgment was affirmed.

(*f*) 2 Term. Rep. 201, *The King v. Watson*, and *The Attorney-General v. Le Merchant* there cited, and reported in a note.

## Bradley v. Goodyear.

In the Court below,

JOEL GOODYEAR, *Plaintiff*; AMASA BRADLEY and EZRA BRADLEY, Administrators of *Joel Bradley*, deceased, *Defendants*.

Action of book debt will not lie, to recover money paid on a note, and not applied.

Plaintiff cannot, in any action, be a witness, to prove such payment.

**A**CTION of book debt. Plea, the general issue. Verdict for the plaintiff.

A bill of exceptions was filed, by the defendants, stating, that the only matter in dispute between the parties was the following charge, in the plaintiff's book :

" 1799.

" Oct. 4.

*Joel Bradley*, Dr.

" To cash, \$ 100, sent by my negro,

" to be indorsed on my note,   *l. 30 0 0*"

And the plaintiff and others were admitted, by the Court, as witnesses, to prove, that the sum of \$ 100 was sent as charged, that it was not applied, and that the note was afterwards taken up, without any indorsement, or mention made of the money.



The error assigned was, that the Court admitted the evidence.

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*Ingersoll and Smith*, (of New-Haven) for the plaintiffs in error, urged, that the principle adopted by the Superior Court, would enable any man to swear away his own note of hand. On trial, he could not, indeed, swear to full payment; but he might charge the plaintiff afterwards on book, and thus effect the same object. They said, also, that in this case, it was, by the plaintiff's own shewing, money paid by mistake, which could not be recovered in a general action, but which must be pointed out particularly.

*Daggett and Staples*, contra, urged, that the whole course of decisions, since the case of *Prentice v. Phillips*, (a) allowed such actions to be sustained. This principle has been constantly recognized, in the Superior Court, from that time to the present; and in this Court, in 1789, the point was made, and expressly decided, in the case of *Hurd v. Fleming, executor of M'Donald*, (b) where the plaintiff charged the executor on book, for money paid on a note, which the deceased held against him, and which had since been sued, and the whole sum recovered. The plaintiff swore, that he took a receipt for the money, and had lost it. A stronger case cannot be imagined.

They also contended, that, without regard to these precedents, money was constantly charged on book, and recovered; and, that the danger of permitting such recovery, was as great, as in this case.

The judgment was reversed, unanimously.

(a) 1 Root, 103.

(b) 1 Root, 172.

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THIS COURT are of opinion, that the Superior Court erred in admitting said testimony,

First, because the facts, proved by the witnesses, cannot support the action of book debt :

Secondly, because the plaintiff cannot, in any form of action, avail himself of his own testimony, to prove facts of this kind.

The action of book debt is peculiar to Connecticut. The allowing a party to support a claim, by his own testimony, is repugnant to general common law principles ; and though the action was originally dictated by a supposed necessity, it ought not to be extended beyond the objects of its institution. It would be difficult, perhaps, to lay down any general principle, which would determine, in all cases, what articles may, and what may not, be charged on book. But, no charge can be admitted on book, unless the right to charge exists, at the time of delivering the article, and arises in consequence of such delivery. In this case, delivering the money, gave no right to charge it on book ; and if the right existed at all, it arose from facts, which occurred subsequent to the delivery.

The plaintiff's right of action, in this case, is founded on a mistake, in taking up the note, and not on the delivery of the money, and ought to have been pursued by an action at common law, and supported by common law evidence. To admit a different principle, would be to admit the party, in all cases, to swear to a misapplication of money. It is, indeed, difficult to see, why a man may not testify to a *fraud*, which entitles him to recover back money, as well as to a *mistake*.

The Superior Court have adopted different principles, in several adjudications, dictated by an imposing equity in particular cases, but which, in their consequences, tend to bring written securities down to a level with mere charges on book, and serve to enable the obligor, by his own testimony, effectually, though indirectly, to destroy his written security. There has, also, been one adjudication of the Court of Errors of the same kind; but the consequences, which have followed, probably were not, then, foreseen. The principles, involved in that decision, are an evident departure from the original action of book debt.

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## Beardsley v. Bennett.

In the original petition,

DANIEL BENNETT, *Petitioner*; SILAS BEARDSLEY, DANIEL KINNEY, and JOB TURRELL, jun. *Respondents*.

**T**HIS was a petition in chancery to the County Court, stating, that on the 19th of October 1799, *Turrell*, one of the respondents, resident in New-Milford in the County of Litchfield, proposed to sell to the petitioner a lot of land in the Susquehanna Purchase, in Pennsylvania, and offered to procure a warrantee deed of the same from *Kinney*, another of the respondents, resident in Pennsylvania, defending against all claims, except the adverse claims of the State of Pennsylvania; that *Turrell* declared to the petitioner, that he knew *Kinney* to be the legal owner of the Connecticut claim to said land, that he had a good right to convey the same, and that he was a man of responsibility, and of a fair character; that the petitioner, confiding in the representations of *Turrell* as to the title, and being himself ac-

A. B. and C. by fraudulent practices upon D. obtain from him a promissory note, payable to C. who is a bankrupt; chancery will relieve against this note.

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quainted with the quality of the land, agreed with *Turrell* to purchase the same ; and that, upon *Turrell's* procuring from *Kinney* and delivering to the petitioner a deed of said land, purporting to be a regular conveyance, the petitioner executed eight promissory notes, of \$20 each, in payment thereof, which, at the request of *Turrell*, were made payable to *Beardsley*, another of the respondents, resident in Pennsylvania. The petitioner then averred, that *Kinney* never had any title to said land, and that the representations of *Turrell* to the petitioner respecting the same were false and fraudulent ; that the notes were obtained from the petitioner without any consideration or benefit to him ; that the contract was illegal and contrary to the express provisions of the then existing laws of Pennsylvania ; that the respondents were all concerned in the fraud ; and that *Kinney* and *Beardsley* were both bankrupts. After stating that five of the notes had been put in suit, the petition concluded, by praying for an injunction against any further proceedings at law thereon, and that they, and those not in suit, might be cancelled.

The County Court found the facts as stated in the petition, and thereupon decreed against the notes, and ordered them to be delivered up, on a joint penalty against the then respondents. The Superior Court, on a writ of error, affirmed that decree.

In the writ of error to this Court, the general error was assigned.

*Smith*, (of Woodbury) and *Bronson*, for the plaintiffs in error.

*Smith*, (of New-Haven) and *Skinner*, for the defendant.

THE COURT affirmed the judgment, DAGGETT and EDMOND, *Ass.* dissenting, on the ground, that, for aught which appeared, *Turrell* was a man of property, and the petitioner had a clear and adequate remedy against him, for the fraud, in an action at law.

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## Tweedy v. Picket.

In the Court below,

TWEEDY and HOWARD, *Plaintiffs*; THOMAS PICKET,  
*Defendant*.

THIS was an action of ejectment.

The plaintiffs claimed title by the levy of an execution; the defendant, by a conveyance from *Ebenezer Picket*.

The jury, found a special verdict, from which it appeared, that on the 13th of September, 1796, *Scymour Picket*, being seized of the demanded premises in fee-simple, conveyed the same to *Ebenezer Picket*, who immediately entered, and, on the 30th of March, 1799, at half past two, in the afternoon, procured his deed to be recorded, and that on the 8th of October, 1796, *Ebenezer Picket* conveyed the premises to the defendant, who immediately entered and continued in possession. It also appeared, that on the 29th of March, 1799, the plaintiffs attached the premises as the property of *Scymour Picket*, which attachment was recorded on the 30th of March, 1799, at half past eleven, in the forenoon; that the plaintiffs afterwards obtained judgment against *Scymour Picket*, took out execution, and levied the same on the premises; that the plaintiffs appointed one appraiser, and the execution debtor neglecting to appoint any, the

In order to make out a title to land, by the levy of an execution, it must be shewn, that the appraisers were indifferent freeholders, and that they were sworn according to law.

An appraiser, who is uncle to the creditor's wife, is not "indifferent" within the meaning of the statute.

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justice appointed the other two, one of whom was *Thomas P. White*, the uncle of *Howard's* wife; and that the premises were, by said appraisers, set off to the plaintiffs, in satisfaction of their execution. It was not found, by the special verdict, that any oath was administered to the appraisers. The Superior Court adjudged the law to be, that the plaintiffs had not shewn a good title, and rendered judgment for the defendant.

While this case was on trial to the jury, the defendant offered parol evidence to prove the relation subsisting between the appraiser and creditor, which was objected to, by the plaintiffs, and admitted, by the Court. A bill of exceptions was thereupon filed.

*Smith*, (of Woodbury) and *Gould*, for the plaintiffs.

*Ingersoll* and *Whittlesey*, (of Danbury) for the defendant.

In support of the judgment below, it was contended,

1. That the appraiser, being uncle by marriage to one of the plaintiffs, was not "indifferent," within the meaning of the statute. (a)

2. That as it did not appear, by the special verdict, that the appraisers were sworn, the plaintiffs had failed of making out a title, by virtue of the execution; and, of course, had received no legal injury, by the judgment of the Superior Court, in admitting the testimony, if it were erroneous.

On the other side, it was urged, that the justice is, by

law, the sole judge of the qualifications of the appraisers; and having appointed them, no court can revise his proceedings. In such case, the justice acts judicially, and, therefore, conclusively. He may be mistaken in the facts; but those facts cannot afterwards be questioned.

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BY THE COURT, TRUMBULL, *Gov.* not judging, HILLHOUSE, *Ast.* absent, TREADWELL, *Lt. Gov.* ELLSWORTH, CHESTER, ALLEN, and EDMOND, *Asts.* dissenting,  
The judgment was affirmed.

## Benton v. Benton.

In the Court below,

SARAH BENTON, *Petitioner*; JOHN BENTON, *Respondent*.

**T**HIS was a petition to the Superior Court for a divorce.

The term *fraudulent contract*, in the statute concerning divorces, includes those causes only, which render the marriage unlawful from the beginning. The Superior Court are not vested with such a discretion, in cases of divorce, that their decree may not be revised in error.

The case, as stated in the petition, and found by the Court, was,—That on the 20th of September, 1800, the respondent and petitioner were lawfully married; that previous to their marriage, the respondent professed a sincere attachment to the petitioner; that she confided in his professions; that his professions, however, were bottomed upon fraud and deceit; that before the marriage, she had been begotten with child by him; that she had prayed out process against him, agreeably to the provisions of the statute concerning “bastards and bastardy”; that his body had been arrested, and was, at the time of the marriage, holden under arrest; that in that situation, and for the sole purpose of avoiding said process, he formed the fraudulent and wicked design of

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marrying her; that at the time of solemnizing the marriage, he harboured the design immediately to leave her, and never to perform any of the duties of a husband to her; and that immediately on completing the marriage contract, he, in fact, deserted her, and had ever since lived in the total neglect of all the duties resulting from the marriage contract, on his part.

On these facts, the Superior Court granted the divorce, and allowed alimony.

*Allen and Staples*, for the plaintiff in error, contended, that the term "fraudulent contract," in the statute authorizing divorces, had an appropriate meaning, when applied to this subject, viz. *imbecility*, or *consanguinity*, which rendered the marriage a nullity from the beginning. (a)

*Smith*, (of Woodbury) for the defendant in error, insisted, that the statute intended fraudulent contract, in its general acceptation; but, if the Superior Court had erred, he contended, that their judgment could not be revised, as with regard to divorces it must be conclusive.

The judgment was reversed, unanimously.

BY THE COURT. There are four causes, for either of which, the Superior Court are authorized, by statute, to grant bills of divorce: adultery; fraudulent contract; wilful desertion for three years, with total neglect of duty, on application of the injured correlate; and seven year's absence of one party, not heard of, which implies no injury, but is evidence of the death of the absent par-

(a) 3 Bla. Com. 94.



ty. If the statute reaches this case, it must fall under the head of *fraudulent contract*; whether it does so, or not, is the question.

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The phrase *fraudulent contract*, in common parlance, admits of great latitude of construction, and will include all those deceptive arts, to which the sexes, too frequently, have recourse, with a view to obtain, what they consider, an advantageous marriage connection; by setting off their persons, characters, tempers, circumstances, and connections, in a too favourable light; or by professions of ardent affection, which they either may not feel, or not in a degree equal to what they profess. These arts, though they meet with various degrees of indulgence, according to circumstances, are still inconsistent with truth and sincerity; and may be, and often are, productive of serious mischief: they partake of the nature of fraud, and a marriage grounded on them, is, in a sense, a *fraudulent contract*. If the phrase be taken in this large sense, the statute would degrade the marriage contract, which, in its original design and institution, was to continue indissoluble, during the joint lives of the correlates, and which is a main pillar, on which society itself is founded, to a level with the most trifling bargains. The legislature can never be intended to do this. To grant divorces in the various cases of fraud, which may be practised, in different degrees, would go far to subvert the ends of marriage, by giving occasion to a promiscuous intercourse of the sexes, which could not fail, in its progress, to fill the earth with violence. The power to do this, therefore, would be a power to do mischief in a point of the greatest moment. To draw the line between the degrees of fraud which would, and those which would not, justify a divorce, must be a matter of nice calculation; and this line must constantly va-

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ry, as the opinions of the judges, or the character of the times, shall chance to vary. The Superior Court, indeed, are as competent to exercise a sound discretion, in matters *referred* to their discretion, as any tribunal whatever; and if it were otherwise, no other tribunal will call their acts in question, which result from the exercise of a legal discretion, whatever opinions may be formed of those acts. But, that the Superior Court are not vested with an unlimited discretion to grant divorces, on the ground of *fraudulent contract*, taken in the unqualified sense explained, appears, not only from the reasons which have been drawn from the momentous and sacred import of the marriage contract, its divine origin, and its essential influence on society, in which respects it is elevated far above the rank of ordinary contracts; but it will further appear, from the following considerations.

Where a word or phrase of indeterminate meaning is used in a statute, its true import must be collected from its application to the subject matter, as explained and used by elementary and other law-writers. The phrase *fraudulent contract*, as applied to the subject of marriage and divorce, in the books, has obtained an appropriate and technical meaning; and is taken to imply a cause of divorce which existed previous to the marriage, and such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in which case, the law looks upon the marriage as null and void, being contracted *in fraudem legis*, and decrees a separation *a vinculo matrimonii*. The legislature not having explained the phrase, it seems reasonable to suppose they used it in this well known and limited sense, and not as used in common parlance.

The legislature have precisely defined all the other causes of divorce mentioned in the statute, so as to leave nothing to discretion or construction ; and it seems unreasonable to suppose, they would study such precision in defining those, while, at the same time, they intended to leave so much to discretion and construction, under the head of *fraudulent contract*, as they would have done, if the phrase be taken in its larger sense.

If, on the contrary, it be supposed, they meant the phrase should receive this broad construction, no good reason can be assigned, why they did not authorize the court to grant divorce in cases of cruelty, or for other cause, which they have, in their own proceedings and acts, on this subject, considered as a reasonable ground of divorce, for it is not more difficult to exercise a sound discretion, in these cases, than in those, which, on this supposition, will constantly occur, under the head of *fraudulent contract*: it would simply extend the field of discretion, its exercise would be equally safe, in both cases. The truth is, while they referred certain defined cases to the Superior Court, they reserved all other cases, which could not be well defined by law, to their own discretion, to be decided on their own merits, on the principles of general policy.

It remains to consider, whether the case spread upon the record comes under the head of *fraudulent contract*, in its *appropriate* sense.

It cannot be pretended the contract of marriage, in this case, was void *ab initio*, though the sole intention of the man in entering into it, was to avoid the process, under which he lay. He might have become of a better mind, and have faithfully performed the duties of a hus-

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band ; in which case, there could have been no doubt of the validity of the marriage, however apparent his fraud might be, at the moment of solemnizing it. A marriage void *ab initio*, is a marriage contracted *in fraudem legis*, and cannot be made valid, by the volition of either, or both, of the parties. But, if this marriage might have been validated, by the volitions of the husband, after a short desertion, it might be, with equal reason, at any future period, during the joint lives of husband and wife ; nor ought any presumption to have been admitted, that it would not, until wilful desertion for three years, with total neglect of duty, had created another specific ground of divorce.

The desertion, in this case, is stated and found to have been *immediately* after the marriage was solemnized ; and hence we are to conclude, the marriage was not consummated, by *deductio ad thalamum*. But two answers may be given to this, each of which are conclusive : first, *deductio ad thalamum*, as to time, is not limited by law ; the proper time must depend on circumstances, and the joint consent of the correlates ; secondly, the previous cohabitation of the parties formed *the twain into one flesh*, as fully as *deductio ad thalamum* could do ; and when the marriage was solemnized according to the rites and forms of law, it was perfect and consummate, as any marriage can be, by *deductio ad thalamum*, after the marriage rites have been solemnized.

## Ingraham v. Phillips.

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In the Court below,

GEORGE PHILLIPS, THOMPSON PHILLIPS, ISHABOD WETMORE, and RICHARD ALSOP, *Plaintiffs*; NATHANIEL G. INGRAHAM, *Defendant*.

**A**CTION of book debt, by writ of attachment, served upon the real and personal estate of the defendant, in September, 1794.

At the December Term of the Superior Court, in Middlesex County, in 1801, a certificate under the bankrupt law of the United States, regularly obtained in New-York, on the 11th of August, 1801, was pleaded in bar. The commission issued on the 16th of February, 1801, and the act of bankruptcy was found, by the commissioners, to have been committed on the 20th of January preceding.

To this plea there was a replication, reciting the 63d section of the bankrupt law, in these words, "*And be it further enacted*, that nothing contained in this act shall be taken or construed to invalidate or impair any lien, existing at the date of this act, upon the lands and chattels of any person, who may become a bankrupt;" and averring, that before the date of said act, the plaintiffs commenced their action, and attached various articles of personal property, and sundry pieces of land, belonging to the defendant, which had ever since been holden to satisfy the judgment.

To this replication there was a demurrer.

The Court adjudged the replication sufficient, and

An attachment, under the attachment law of this State, creates a lien upon the property attached, within the meaning of the 63d section of the bankrupt act.

Where a suit is commenced by attaching the property of the defendant, and the defendant afterwards commits an act of bankruptcy, and regularly obtains a certificate, and pleads the same in bar of said suit, judgment will be rendered against the defendant, but execution will issue against the property attached only.

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gave judgment for the plaintiffs to the amount of their debt, but ordered execution to issue against the property attached only.

The defendant brought a writ of error, assigning for cause the general error.

*Daggett and Hosmer*, for the plaintiff in error.

The judgment of the Court below proceeded on the ground, that the attachment of *Ingraham's* property constituted a *lien* within the construction of the act. The plaintiff in error contends, that this construction is unwarranted; that the word *lien* has not been applied to *attachment*, by law writers; and that this, from a survey and comparison of the various parts of the bankrupt law, could not be the meaning of the national legislature.

In that bankrupt law, of which ours is nearly a transcript, and, undoubtedly, *to be in like manner expounded*, the word *lien* has long been *definitely* applied. It has ever been construed to extend to cases of contract, *express*, or *implied*; (a) to mortgages and pledges, which, by express contract, constitute a lien, or *jus in re, et ad rem*; to the rights of factors, packers, dyers, policy brokers, innkeepers, &c. in whose favour a contract is implied. These are the liens, that have been recognized under the English bankrupt law. And not an instance of a lien can be found, but the person claiming to have it, has the *possession*, and a *right of property*, in the thing. Hence, a lien, in its unvarying legal use, has been considered as implying the *possession*, and a *right of possession*.

(a) *Cooper* 273. *Cullen* 207, 210. 1 *Cook* 454.

But an attachment gives the creditor neither possession, nor the right of possession. He has, in a certain event, a *priority*. The effect, then, of an attachment is not a lien, but a priority.

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The word lien, being contained in a national law, must receive an uniform construction throughout the United States. But, in many of the States, attachments are unknown. There the word lien must mean something else, or be without a meaning.

Strange it is, that the law should make particular provision, relative to attachments, in the 51st section; and that, for a *proviso*, we are to look at the 63d section!

Again, it is very extraordinary, that if attachments are liens, no legal method has been designated, to render them efficacious.

The 51st section, relative to attachments, is very unequivocal. It provides for the distribution of the bankrupt's effects, that there shall be a proportionable payment, regarding the amount of each debt; so that every creditor, having security for his debt, by *judgment*, *statute*, *recognizance*, or *specialty*, or having an *attachment* under any of the laws of the individual States, or of the United States, on the estate of the bankrupt, (provided there be no execution executed) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, "for more than a *rateable* part of his debt with the other creditors of the bankrupt." It is here to be remarked, that attachments are put on a footing with judgments, statutes, recognizances, and specialties. By the laws of many, probably of most of the States, a judgment gives a *priority*. A statute has the

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same effect. The creditor by a recognizance, or specialty, has a right to full payment before the simple contract creditor. If the right of one is presumed, so it is of all. Then, in New-York, the judgment and specialty creditor may sweep away the whole estate of the bankrupt. No person ever indulged so absurd an idea. It has never been pretended, that the specialty creditor, or the creditor on statute or recognizance, had the right to hold exclusively of others.

It is also to be remarked, that the words are unrestrained; they look backwards as well as forwards. They relate to the very *date* of the act, and, of course, to the previous *liens*: "That every creditor having security," &c. "shall not be *relieved*," *i. e.* have legal remedy, "for more than a proportionable part."

Further, the construction, which is opposed to the lien of an attachment, is the more probable, because *this* lien is far from being universal in the States, and, in many, is thought to be unreasonable, and impolitic. At the same time, they have their liens by specialty, &c. To suppose that the specialty lien is dissolved, and that the attachment lien remains, would be absurd.

The doctrine of lien by attachment is opposed to other parts of the act. By *sect. 5th*, the commissioners are to take into possession *all* the estate of the bankrupt, and inventory and appraise it. By *sect. 6th*, they are to transfer *all* to the assignee. By *sect. 10th*, the assignment is to be good, as against the bankrupt, and *all persons claiming from him, by subsequent act*. By *sect. 12th*, when property is *conveyed* or *assumed* on condition to redeem, they may redeem, and *shall assign*, for general benefit. By *sect. 13th*, they may assign *all* the debts.



By *sect.* 29th, and 30th, a dividend is to be made among such as have proved their debts, and *in proportion*. Then comes *sect.* 31st, providing for the distribution, in the clearest manner, and shewing that the property assigned, &c. was subject to *attachment*, and included *the whole of the bankrupt's estate*. And *sect.* 44th authorizes the sale of all the bankrupt's estate at auction. Viewing these provisions together, it appears, indisputably, that the commissioners are to assign *all* the estate of the bankrupt, and are to distribute it *proportionably*, with this exception, that where there is a *right of property*, arising out of *lien by conveyance or assurance*, they shall redeem.

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It is worthy of remark, that the English act allows of no preference by *judgment or attachment*. (b)

But, admitting that the attachment was a lien, still we contend, that *the suit was barred*, and the plaintiffs below must resort to some other method of rendering their lien *effective*. If an attachment constitutes a lien on the property, and gives a preference, the *commissioners*, by *sect.* 12th, must *pay the debt*. If they do not, you may procure an order to sell the property, by application to the *District Judge*, who stands in the place of the *Lord Chancellor* in England. (c) In *Bro. Ch. Ca.* 548, there is a standing order on this subject. The commissioners are to sell the property at auction ; to settle the account ; to receive the surplus ; or, if there is a deficiency, to permit the creditor to prove *pro tanto*. The commissioners are to settle the whole. If the bankrupt obtains his certificate, it is a *bar* to all debts due and owing at the commission of the act of bankruptcy. It is unheard

(b) *Cullen* 242, 3, &c. *Cooper* 186.

(c) *Cooper* 186, and 266. 2 *Atk.* 573.

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Further, the statute, unequivocally, makes the certificate a bar. "The bankrupt shall be discharged from all debts by him due and owing, or which might have been proved." (e) The cause of action is taken away in "*all possible cases.*" How, then, if the certificate is pleaded, can a judgment be rendered? The same section declares, that the defendant shall not further be "*impleaded*" for, or on account of, any of said debts. It also provides, that the certificate shall be sufficient evidence, and a verdict shall pass for the defendant; unless there is proof of *fraud or concealment*. It is remarkable that this section has *one exception*, and *two provisos*, and nothing is said about attachments, or proceeding at law, in any case. Then, the cause of action is extinguished; the bankrupt shall not be impleaded; verdict shall be given for him; and this in every possible case.

Finally, as the right of action is taken away, so is the *jurisdiction of the Court*, as to any *ulterior proceedings*.

*Dwight*, for the defendants in error.

It appears from the record, that the attachment was prior to the date of the bankrupt law. The question, then, is simply this: Does a creditor, in Connecticut, by virtue of an attachment, acquire a *lien* upon the property of his debtor? *Lien* is a right which one man has to hold the property of another, until the claim of the former is satisfied. The attachment law of this State authorizes a creditor to attach and hold the property of his debtor, to respond the judgment, which he shall ob-

tain in the action thus commenced. The first attachment gives a complete preference, which cannot be defeated by any subsequent act of the debtor, or of other creditors. If it be possible to frame a case exactly to meet the provisions of the 63d section of the bankrupt law, one would think this to be that case ; and no reasoning can illustrate, or enforce this point.

The authorities cited do not apply, because in England they have no such attachment law, and, of course, no such lien.

But, it is contended, that the certificate is a *bar*, and that, of course, no judgment can be rendered. The effect of the certificate is to discharge the bankrupt from *all his debts*, due at the date of the commission ; so that neither his person, nor his future acquisitions shall be liable therefore. This effect can be secured to the bankrupt, in the present case, on the principles for which we contend. The judgment is against the defendant ; but, as it appears by the pleadings, that he has received his certificate, *execution* is ordered against *the property taken and holden by the attachment*, and to be satisfied solely by that.

BY THE WHOLE COURT,

The judgment was affirmed.

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## Skinner v. Smith.

In the Court below,

ELIJAH SMITH, *Petitioner*; ROSWELL SKINNER, CALVIN OWEN, JERUSHA OWEN, SAMUEL OWEN, AZARIAH PHELPS, APOLLOS BATES, and ERASTUS BATES, *Respondents*.

Fifteen years possession, where no statute disabilities, or special circumstances equivalent thereto, exist, will bar an equity of redemption.

**T**HIS was a petition in chancery to redeem certain mortgaged lands, brought to the Superior Court, in April, 1799.

The petition stated, that on the 20th of August, 1766, the petitioner was indebted to *Elnathan Smith*, in the sum of 29*l*. and mortgaged to him a tract of land containing about sixty acres, as security for the payment of that sum, within three years; that the petitioner remained in possession till March, 1767, and then leased the premises to *Samuel Owen* and *Seth Owen*, who immediately took possession; that on the 20th of October, 1767, *Elnathan Smith* conveyed forty five acres of said land to *Seth Owen*, and fifteen acres to *Samuel Owen*, they being in possession under the petitioner, and having knowledge of all the facts; that *Seth* continued in possession of the forty five acres, several years, and died leaving two children, *Calvin* and *Jerusha*, who were in possession, at the date of the petition, by their guardian, *Roswell Skinner*; that *Samuel Owen*, also, held the part which he purchased, several years, and then conveyed the same to *Azariah Phelps*, who took possession of the same, and afterwards conveyed the same to *Apollos* and *Erastus Bates*, who were in possession, when the petition was brought.

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The petition also stated, that the petitioner, from October, 1768, when he was attacked with the rheumatism, to the date of the petition, was poor, and infirm, and a cripple ; that before the law day expired, by the assistance of his friends, he paid *Elnathan Smith*, the mortgagee, 26*l.* to be applied on the mortgage ; and before the date of the petition, he tendered to the respective persons interested in the mortgaged estate \$52 50, being the full amount of principal and interest then due ; that *Seth Owen* and *Samuel Owen* had been repeatedly applied to, within fifteen years anterior to the date of the petition, in behalf of the petitioner, to suffer him to redeem said estate, but they had ever refused their assent thereto ; and that the rents and profits of the land had amounted to more than 6*l.* annually, which the several occupants had received, but no account thereof had ever been rendered.

The petitioner, therefore, prayed for an account of the rents and profits, and for liberty to redeem.

But, before the Court, he waived, in writing, all right to an account for the rents and profits, and consented to pay the balance due of the mortgage money.

To this petition the respondents made their plea, alleging, that on the 20th of October, 1769, *Samuel Owen* entered upon and took possession of part of the mortgaged premises, and *Seth Owen* of the residue ; that *Samuel* continued in possession of his part till the 13th of March, 1776, and then conveyed the same to *Seth* ; that *Seth* continued in possession of the residue, till that time, and afterwards, of the whole, till his death, in 1795 ; that the premises then descended to his children, *Calvin* and *Jerusha*, who immediately entered upon the same,

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and continued in possession thereof till the date of the petition; that the several possessors, while thus in possession, took the whole issues and profits to themselves, and held out all others, and that of these facts the petitioner had notice; that the petitioner did not, within fifteen years after said *Samuel* and *Seth* took possession of the premises, make his entry upon the same, nor sue out his right, title, or claim thereto; that he was, during all the time aforesaid, of full age, and *compos mentis*, not imprisoned, nor beyond seas; and that, therefore, the petitioner was barred of his claim to redeem.

To this plea there was a demurrer, and joinder in demurrer. The Court adjudged the plea insufficient, and decreed, in favour of the petitioner, that he should have liberty to redeem the mortgaged premises, upon payment of \$50. It appeared, that the lands were worth \$600.

*Perkins*, (of Hartford) and *Terry*, for the plaintiffs in error, took sundry exceptions to the judgment of the Superior Court, but that on which they principally insisted, was, That the estate having been mortgaged more than thirty years from the date of the petition, and having been in the exclusive possession of the mortgagee, and those who held under him, the equity of redemption is barred, in analogy to our statute of fifteen years possession.

They insisted, that unless there be insanity, imprisonment, infancy, absence beyond sea, coverture, fraud, receipt of principal or interest, bringing a bill to foreclose, submitting to answer as mortgagee, or some act, by which the estate is treated as mortgaged property, the claim to redeem is barred. In support of this doc-

trine, they cited 1 *Pow. Mort.* 148. *White v. Ewen*, (a) *Aggas v. Pickerell*, (b) *Jenner v. Tracy*, (c) *Crittendon v. Brainerd*, (d) and *Sheldon v. Bird*. (e)

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*Goodrich*, (of Hartford) for the defendant in error, argued, that as the mortgagor leased the property to the purchasers, it was unfair for them to take a conveyance from the mortgagee, and afforded an equitable ground to exempt the case from limitation ; that the infirmity of the petitioner was of that peculiar kind, which was equal to imprisonment, or being beyond sea ; that the disproportion between the value of the property, and the money due on the mortgage, was such as to form a ground for relief ; that an account is here waived, and of course, none of the difficulties occur, which attend stale mortgages ; that the purchasers were acquainted with all the facts aforesaid, and the respondents acknowledged the property in question to be mortgaged property, though they denied the right to redeem.

The judgment of the Superior Court was reversed, AUSTIN and SMITH, *Asts.* dissenting.

BY THE COURT. Although it cannot be admitted as a rule, that a mortgagor shall have fifteen years to redeem, for that special circumstances may limit his equity to a shorter period ; yet it may be adopted as a rule, that the mortgagee being in possession, a mortgagor shall not have *more* than fifteen years to redeem, after his equitable right has accrued, unless the delay shall be accounted for, by statute disabilities, or other special cir-

(a) 2 *Vent.* 340.(b) 3 *Atk.* 225.(c) 3 *P. Wms.* 287.(d) 2 *Root* 485.(e) 2 *Root* 509.

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cumstances, that may be considered equivalent. For, a mortgagee, who has paid a valuable consideration, and acquired a possession by law, should not be in a worse condition than a disseizor. In this case, no such disabilities, or special circumstances, exist; and the mortgagee, and those holding under him, have had the possession a much longer period than fifteen years.

## Frost v. Dougal.

In the Court Below,

DAVID DOUGAL, *Plaintiff*; ELISHA FROST, *Defendant*.

An officer having an opportunity to levy an execution in his hands on the body or property of the debtor, is liable to the creditor, if he neglects to levy. A return of *nulla bona* and *non est inventus* is, in such case, a *false* return.

THIS was an action on the case against the defendant, as constable of New-Haven, for making a false return of *nulla bona* and *non est inventus* on an execution, in the plaintiff's favour, against *Jonathan Mix*.

There were special pleadings, which terminated in a demurrer. The case, as it appeared from the record, was, that the plaintiff had recovered a judgment against *Jonathan Mix*, and on the 14th of July, 1801, took out execution in common form; on the 20th, he delivered it to the defendant, to be executed; on the 3d of August, *Mix* committed an act of bankruptcy; on the 18th, a commission issued, under which he was, the next day, declared a bankrupt; and, on the 3d of September, the defendant returned the execution as above. It appeared, that immediately after the defendant received the execution, he saw and conversed with *Mix*, and might have taken him; and that *Mix* then had property sufficient to satisfy the execution, which the defendant might have taken.



The Superior Court rendered judgment for the plaintiff.

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In this Court, the general error was assigned.

*Daggett* and *Mills*, (of New-Haven) for the plaintiff in error, contended, that the officer must have a reasonable time to do his duty ; that by the act and commission of bankruptcy, *Mix* and his property were taken into the custody of the law, before a reasonable time had elapsed, and that he became *civiliter mortuus*. (a)

*Ingersoll* and *Staples*, for the defendant in error, contended, that this act of bankruptcy was not the act of God, but of the debtor ; and that, if an opportunity presents to levy an execution, and the officer neglects to levy, the debtor is thereafter at his risque. They cited *Fish v. Aston Miles*, (b) *Dalt. Off. Shff.* 3, *Beckford v. Montague*, (c) and *Benton v. Sutton*. (d)

BY THE WHOLE COURT,

The judgment was affirmed.

(a) 1 Burr. 20, *Cooper v. Chitty*. 2 Burr. 814, *Coppendale v. Bridgen*. 1 Term Rep. 475, *Smith v. Miller*.

(b) *T. Jones* 40.

(c) 2 Esp. Rep. 475.

(d) 1 Bos. and Pul. 24,

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## Bulkley v. Stewart.

In the original action,

JANE STEWART, JARED STARR, and WILLIAM WINTHROP, Administrators of *William Stewart* deceased,  
*Plaintiffs*; CHAUNCEY BULKLEY, *Defendant*.

Money voluntarily paid in compliance with an

award of arbitrators, cannot be recovered back, in an action of *indebitatus assumpsit*.

An award performed will be a sufficient bar to an action, for the matters submitted, and awarded upon,

until regularly set aside; nor can the plaintiff in such action attack its validity, by alleging fraud in the party,

in obtaining it.

# ACTION of *indebitatus assumpsit*.

The declaration stated, that on the 13th of April, 1798, the defendant applied to *Stewart*, and others, to subscribe a policy, insuring \$3,000 on the cargo of the brig *Polly*, from the Havannah to New-York, and represented to them, that the situation of the brig and cargo, as to safety, loss, or injury, was then wholly unknown to him; that *Stewart*, relying on this representation, subscribed the policy for \$100; that, in truth, the brig and cargo were, at that time, wholly lost, which was then well known to the defendant, but of which *Stewart*, and the other underwriters, were entirely ignorant; that on the 18th of July, 1799, *Stewart* being then deceased, the defendant applied to the plaintiffs, and represented, that the brig and cargo were wholly lost, and demanded the \$100, thus insured, by *Stewart*; and that the plaintiffs, relying upon the good faith of the defendant, and believing, from the defendant's representation, that the loss was fair, and that the deceased was holden by the policy, to pay the sum by him subscribed, accordingly paid the \$100 to the defendant. After averring, that the fact of loss, and the defendant's knowledge, were concealed fraudulently, the declaration concluded, by setting forth, in common form, the defendant's indebtedness, his liability to pay, and *assumpsit*.

The defendant pleaded in bar of this action, that the policy contained a stipulation, that, in case any controversy should arise between the underwriters and the defendant, it should be referred to arbitrators ; that, on his claiming a total loss, and the underwriters, and the plaintiffs, refusing to pay, insisting that the policy had been obtained fraudulently, by the defendant's then knowing and concealing the loss, they mutually submitted the controversy to *S. W. Dana* and *S. T. Hosmer*, Esqrs. who, on the 8th of July, 1799; heard the parties thereon, and, by their mutual consent, the underwriters and the defendant were admitted, without oath, to declare to the arbitrators their knowledge of all facts respecting the controversy ; and were respectively interrogated by each other respecting the same : whereupon the arbitrators awarded, that the policy was fair, and that the underwriters should pay the defendants for a total loss, according to the terms of the policy ; and thereupon, and in pursuance of the policy, and the award, which remains in full force, the plaintiffs paid the \$ 100 to the defendant.

The plaintiffs replied, confessing the submission and award, and alleged, that the award was, in fact, obtained, by a continuance of the same fraud and deception, which was, by the defendant, practised, at the time of obtaining the policy, as set forth in the declaration ; that, with a design to defraud the plaintiffs, he solemnly declared before the arbitrators, that, at the time of effecting the insurance, he had no knowledge of the loss ; and that the plaintiffs and the underwriters, when the defendants made this declaration, were ignorant of his having had such knowledge.

To this replication the defendant demurred ; and the County Court adjudged the replication sufficient.

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On a writ of error to the Superior Court, that judgment was affirmed.

A writ of error was, thereupon, brought to this Court, to reverse both those judgments.

*Daggett and Huntington*, (of Middletown) for the plaintiff in error.

*Ingersoll*, for the defendants.

BY THE COURT. To maintain this action, the principle must be assumed, that money paid in obedience to an award of arbitrators, may be recovered back, by impeaching the conduct of the party, in obtaining the award ; and, in a form of action not at all applicable to the question raised between the parties. The action of *indebitatus assumpsit* for money had and received, though governed by equitable principles, and not to be sustained in opposition to equity, cannot be substituted for that mode of relief, which belongs only to chancery.

The plaintiffs, in this case, treat the award as void, and the payment, made under it, as furnishing the defendant no ground to retain the money. An award of arbitrators decides the rights of the parties as effectually, as a judgment at law, or a decree in chancery ; and is as binding, until it be regularly set aside, or its validity questioned in a proper manner. When it is not made under a rule of court, it may be annulled, by a decree in chancery, on a bill shewing corrupt practices of the arbitrators, or parties, or the mistake of the former, or any accident, or proper ground for a new trial, attending the case of the losing party. (a) But he can never leap over

(a) 2 Eq. Ca. ab. tit. Award.

it, treating it as void, and litigate his right anew, by commencing an action, as if it had not been made ; and, in a collateral manner, attack its validity.

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When not complied with, it shall, in some cases, furnish a rule of damages, in an action brought on the original claim. If, however, in such cases, there are any circumstances, which would be a sufficient objection, in point of law, to an award, it will be open for the parties to shew it, at the trial. (b)

In the case at bar, whatever fraud may have been practised, by *Buckley*, in effecting the policy ; it was submitted to, and awarded upon by, the arbitrators. The parties were at liberty to submit the controversy, on such terms, as to them seemed proper and eligible. That they agreed to admit each other as witnesses, and mutually interrogated each other, constituted no difference, in effect, between an award made on such evidence, and one on that, which is ordinarily used in trials. It gave the case the aspect, and the parties the advantages, of a process in chancery ; and, it seems, the plaintiff's elected this mode of trial, from the want of common law evidence. It is, therefore, highly improper, in them, now to draw in question the integrity of the testimony of their adversary, to which they appealed, and on which they agreed to rely. It would be laying a snare for him, which is not to be allowed. (c)

The award was acquiesced in, and the money voluntarily paid, by the plaintiffs. This action does not lie to recover back money voluntarily paid on a claim, which

(b) 1 *Esp. Rep.* 577, *Bailey v. Lechmere*.

(c) *Peake's Rep.* 157, *Stevens v. Thacher* 1 *Root* 319, *Butler v. Catling*.

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the party disputes, though he pay it, expressly reserving his right to litigate his claim; much less when paid in obedience to an award deciding the claim. (d)

It would be a very dangerous precedent to allow a recovery in this case. The fraudulent conduct of *Bulkley* before the arbitrators, as alleged by the plaintiffs, cannot change the right of the parties, as settled by the award. It may be the foundation of relief in chancery, or of an action at law, for that precise wrong; but it does not constitute him, in any sense, or to any purpose, the receiver of the money, thus paid in compliance with the award, to the use of the plaintiffs.

Judgment reversed.

(d) 1 *Esp. Rep.* 84, *Knibbs v. Hall*. *Id.* 279, *Brown v. Kinally*. 2 *Esp. Rep.* 546, *Mariott v. Hampton*. *Id.* 723, *Cartwright v. Rowley*.

## Cone v. Cone.

In the Court below,

STEPHEN CONE, jun. *Plaintiff*; STEPHEN CONE, JASON HAMMOND, and JAMES FOSTER, *Defendants*.

A declaration in ejectment, containing the usual allegations, is good, without demanding seizin and possession in the conclusion.

**T**HIS was an action of ejectment.

The declaration contained the usual allegations. It began thus: "In a plea, that to the plaintiff the defendants render the seizin, and quiet possession of a parcel or tract of land," &c. It concluded with a demand of damages and costs, and omitted any further demand of seizin and possession.

There was a general verdict in favour of the plaintiff,

on the issue of *no wrong or disseizin*, regularly joined, and then a motion in arrest, for the insufficiency of the declaration. This motion was, by the Superior Court, adjudged sufficient, and the verdict set aside.

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The judgment of the Superior Court, on the motion in arrest, was assigned as cause of error.

*Dana and Dwight*, for the plaintiff.

*Perkins*, (of Hartford) and *Staples*, for the defendants.

The judgment was reversed, unanimously, and the verdict established.

BY THE COURT. The judgment of the Superior Court was defended on the authority of *Hawley v. Castle*, (a) and *Porter v. Warner*, (b) which cases are directly in point; but there appears no sufficient reason to warrant those decisions. The omission in this declaration is, at most, only matter of form; and such a defect is never regarded after verdict. But there is no defect even in point of form. The declaration once demands the seizin of the land, and it concludes with a demand of damages and costs. The declaration, therefore, is apt to the purpose in view, and sufficiently clear and certain, both to a common and legal intent.

The most approved English forms from *Lilly's Entries*, and the Pleader's Assistant, so far as they apply to this declaration, justify it; and the declarations in the actions of debt and ejectment, with respect to the present question, are somewhat analogous.

(a) *Kirby* 218.

(b) 1 *Rep.* 439.

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On the general principles of law, therefore, and the most approved precedents, the declaration in question is good; and, consequently, the judgment of the Superior Court is erroneous.

## Barber v. Minturn.

In the Court below,

BENJAMIN G. MINTURN, and JOHN T. CHAMPLIN, of the City of New-York, *Plaintiffs*; OLIVER BARBER, GEORGE W. BARBER, AARON HOSFORD, of Wethersfield, OLIVER GOODRICH, and AARON HOSFORD, of Hartford, *Defendants*.

**T**HIS was an action on note, by process of attachment, service whereof was made, on the 10th of February, 1797, on the copartnership property of the defendants, and also on the private property of *Oliver Goodrich*, one of the defendants.

The note purported to have been executed by the defendants, in their copartnership name, on the 1st of October, 1796, and made payable to the plaintiffs, on the 1st of January, 1797.

*Oliver Barber* pleaded in bar of the action, that he executed the note declared on after the suit was instituted, and antedated it, with a view to secure to the plaintiffs, in preference to other creditors, the property attached, without the knowledge of the rest of the defendants. To this plea the plaintiffs demurred.

In an action on note against several copartners, it is not a good defence for one of them, that he executed the note in the copartnership name, after the suit was instituted, and antedated it, with a view to secure to the attaching creditor the property attached, without the knowledge of the others.

An act of insolvency by the legislature of this State, discharging the insolvent from all his

debts, may be pleaded in bar of an action on a contract entered into, in another State, with citizens of another State, to prevent judgment against the defendant *generally*; but if, in such case, property had been attached before the passing of the act, a special judgment may be rendered, and execution issue against that property.



The other three defendants (*George W. Barber* having died during the pendency of the suit) pleaded severally, that they brought their respective petitions to the General Assembly of the State of Connecticut, in May, 1799, praying for acts of insolvency in their favour; that they caused service thereof to be made upon the plaintiffs, by leaving copies with *Theodore Dwight*, Esq. their attorney; that the General Assembly continued said petitions to their next session in October, and ordered public notice of the pendency thereof to be given in the newspapers; that notice was accordingly given; and that in October, 1799, the General Assembly passed, on each of said petitions, a special act of insolvency, thereby discharging these defendants, respectively, from all their debts, whether of a copartnership, or a private, nature. The conditions, on which these discharges were to take effect, were alleged to have been performed.

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The plaintiffs replied, that in February, 1797, they attached the property of the defendants, according to the indorsement of the officer on the writ, which was holden to respond the judgment in this suit. To this replication there was a demurrer.

The Superior Court rendered judgment for the plaintiffs, on all the issues, and granted execution against *Oliver Barber*, in common form, and against the other defendants, *to be levied on the property attached only*.

The defendants brought a writ of error, and assigned the general errors.

*Edwards*, (of New-Haven) and *Mills*, (of New-Haven) for the plaintiffs in error, contended,

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1. That the plea of *Oliver Barber* was sufficient, for that executing the note in this way, was not a part of the business of the copartnership, and, therefore, not binding on the other partners, and if not on all, then not on any.

2. That by the acts of insolvency, the other defendants in the Court below were entirely discharged; and the property attached must go into the general mass for the benefit of all the creditors. The legislature, with all the facts in view, have thought proper to pass these acts, and the Courts of this State are bound to give them effect.

*Daggett* and *Dwight*, for the defendants in error, contended,

1. That it lay not in the mouth of *Oliver Barber* to make the defence, which he had set up.

2. That by our statute, the attaching creditors obtained a *lien* (a) which they could substantiate, and thereby secure themselves against all the other creditors. It is the policy of our law to give this preference.

BY THE WHOLE COURT,

The judgment was affirmed.

(a) Vide *Ingraham v. Phillips*, ante 117.

## Washburn v. Merrills.

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In the Court below,

MEAD MERRILLS, *Petitioner*; WILLIAM WASHBURN and RACHEL his wife, JARED MUNSON and ELIZABETH his wife, THOMAS DUTTON, and STEPHEN SANFORD, 2d. *Respondents*.

THIS was a petition in chancery to redeem certain lands as mortgaged property, brought to the Superior Court, in August, 1801.

The following facts were set forth in the petition, and found by the Court: On the 18th of November, 1784, *Solomon Sanford*, being indebted to *Rachel M'Donald*, in the sum of 162*l.* 15*s.* executed his promissory notes to her, for the payment of that sum; and, further security being required, it was agreed between them, that he should execute to her a mortgage deed of two pieces of land, containing about fifty acres, as collateral security for the debt, and to contain a condition, that on payment thereof, the deed should be void. On the same day, he executed to her a deed of said land, which was intended to be drawn and executed as a mortgage deed, in pursuance of their agreement, but was, by mistake and accident, drawn and executed as an absolute deed. This mistake was not discovered by *Sanford*, till some time after the deed was delivered. Miss *M'Donald* was afterwards married to *William Washburn*, who, in 1788, in right of his wife, forced *Sanford* out of possession. On the 18th of February, 1795, *Sanford* conveyed his right in the premises to *Mead Merrills*, the petitioner; and on the 7th of March, 1801, *Washburn* and his wife sold, by deeds containing the usual covenants of seizin

It having been agreed between the parties to a deed, that it should be executed as a mortgage deed, which, by mistake and accident, was executed as an absolute deed, chancery will treat it as a mortgage.

Parol evidence is admissible to shew the mistake.

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and warranty, the whole of said land, in three several parcels, to *Thomas Dutton, Stephen Sanford, 2d. and Elizabeth, wife of Jared Munson*. Of these facts all the respondents had knowledge, and refused to permit the petitioner to redeem.

The respondents, for answer, pleaded the statute of frauds and perjuries, with an allegation, that there was no note or memorandum in writing of the agreement. This allegation was found, by the Court, to be true.

On the trial of this case, the petitioner offered witnesses to prove the mistake, which was objected to, by the respondents ; but the objection was overruled by the Court, and the witnesses admitted. The respondents, thereupon, filed their bill of exceptions.

The Court decreed, in favour of the petitioner, a redemption of the land, upon his paying the principal and interest due on the notes, and costs of suit.

*Daggett and Allen*, for the plaintiffs in error, contended,

1. That the deed being absolute, the possession of *Sanford*, the grantor, was the possession of the grantee, which, with the *actual* possession of the grantee, was more than fifteen years.

2. That the allegation of mistake and accident is insufficient. To this point were cited 1 *Fon. Eq.* 188, *Langley v. Brown*, (a) *Harvey v. Harvey*, (b) *Joyes v. Statham*, (c) and *Baker v. Paine*. (d)

(a) 2 *Atk.* 203, [196]

(c) 3 *Atk.* 357, [388]

(b) 2 *Ch. Ca.* 180.

(d) 1 *Ves.* 456

3. That this agreement, being parol, cannot be proved.

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*Smith*, (of Woodbury) and *Gould*, for the defendant in error, argued, That a mistake in an instrument is always a head of relief in chancery ; and that the very idea of a mistake precluded its being in writing. They cited *Joynes v. Siatham*, (e) *Shelburne v. Inchiquin*, (f) 1 *Pow. Con.* 432, *Crosby v. Middleton*, (g) *Baker v. Paine*, (h) *Simpson v. Vaughan*, (i) *Henkle v. Royal Exchange Assurance Company*, (j) *Pitcairn v. Ogbourne*, (k) *Chapman v. Allen*, (l) *Matson v. Parkhurst*, (m) and *Cook v. Preston*. (n)

BY THE WHOLE COURT,

The judgment was affirmed.

(e) 3 *Atk.* 358, [389]

(f) 1 *Er. Ch. Ca.* 341

(g) *Prec. Ch.* 309.

(h) 1 *Ves.* 459.

(i) 2 *Atk.* 31.

(j) 1 *Ves.* 318.

(k) 2 *Ves.* 376.

(l) *Kirby* 399.

(m) 1 *Root* 464.

(n) 2 *Root* 78

## Bishop v. Bull.

In the original action,

GEORGE BULL, WILLIAM JUDD, NOADIAH HOOKER,  
and LUKE WADSWORTH, *Plaintiffs*; ABRAHAM BISHOP and JOHN BISHOP, *Defendants*.

**A**CTION of *assumpsit*.

The defendants were thus described in the writ:  
“*Abraham Bishop of New-Haven, and John Bishop,*  
“*heretofore of said New-Haven, now dwelling and inhabit-*

In an action on a joint contract against A. and B. describing B. as not an inhabitant of this State, service on A. alone is

sufficient, though B. should become an inhabitant before the return-day of the writ.

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"*ing in the Kingdom of Great-Britain.*" The defendants, having suffered a judgment against them, by default, in the County Court, brought a writ of error to the Superior Court, for error in fact, averring, that nineteen days before the return-day of the writ, *John Bishop* arrived in New-Haven, where he had ever since remained, and that he had never had any legal, or actual notice of the suit.

The defendants in error pleaded specially, that the action was brought on a joint contract, and that more than thirty days before the return-day of the writ, it was duly served on *Abraham Bishop*.

To this plea there was a demurrer. The Superior Court adjudged the plea sufficient, and affirmed the judgment of the County Court.

*Ingersoll and Smith*, (of New-Haven) for the plaintiffs in error.

*Perkins*, (of Hartford) and *Staples*, for the defendants.

BY THE WHOLE COURT,

The judgment was affirmed.

## Stewart v. Warner.

In the Court below,

JONATHAN WARNER and GIDEON LEET, *Plaintiffs*;  
 JAMES STEWART, *Defendant*.

THE sentence of a foreign court of admiralty is conclusive, and cannot be impeached in this country, until regularly set aside, in the country where passed.

THIS was an action of trover, for the conversion of the brigantine *Matilda*, in common form.

On trial to the jury, on the general issue, it was admitted, that the property of the vessel was formerly in the plaintiffs, and that she was sent out by them on a voyage to the West-Indies, in the month of March, 1799. The defence was, a condemnation of the vessel by the Tribunal of Commerce and Prizes sitting at Basse Terre, in the Island of Guadaloupe, under the jurisdiction of the Republic of France. To invalidate this condemnation, the plaintiffs offered the deposition of *Ira Cunfield*, the master, to prove, that it was obtained by the fraudulent conduct of the defendant. The defendant, after having read the deposition to the Court, for the purpose of taking an exception thereto, did object, that it was wholly irrelevant, and inadmissible. The Court overruled the objection, and admitted the evidence, which, as appears from a bill of exceptions filed by the defendant, was to the following effect : That the vessel and cargo having been consigned to the deponent, by the plaintiffs, he disposed of part of the cargo in the Island of Anguilla, and on the 26th of May, 1799, sailed thence for St. Bartholomews ; that on his way, he secreted one thousand Spanish milled dollars under the star-board bath, within the ceiling, being the avails of the property, which he had sold at Anguilla ; that soon afterwards he arrived at the entrance of the harbour of Gustava, in St. Bartholomews, where the vessel was captured, by two French privateers, and sent to the Island of St. Martins ; that on the day following, the deponent, having been landed, and set at liberty, met the defendant, in the street, at St. Bartholomews, who appeared willing to befriend him, and offered to assist him, if he wished, and invited him to his lodgings ; that the deponent informed the defendant of his having secreted the money in the vessel ; that the defendant then enquired very particularly as to the condition of the vessel ; that three days afterwards

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the defendant told the deponent, that he had purchased half of the vessel, and offered the same to the deponent, if he would take her in St. Martins, where she was, unseen, and pay the defendant five *per cent.* commissions, and give him an answer in half an hour; that on the deponent's objecting to these terms, for want of time, and means of payment, as well as because the vessel was not then condemned, the defendant proposed to him to draw bills on his owners; that the information respecting the secreted money was given to the defendant *in confidence*, and that he soon betrayed that confidence, by disclosing the secret, and materially changed his conduct towards the deponent.

A verdict was found, and judgment rendered, for the plaintiffs.

The admission of the deposition in evidence was assigned as cause of error.

*Ingersoll* and *Hosmer*, for the plaintiff in error.

The question, which arises upon this record, is, whether the Court might, on any principle of general law, permit testimony to be given, to shew, that *Stewart*, the defendant below, obtained "said condemnation by his fraudulent conduct?" This question is extremely interesting, when it is considered, that it relates, not to the right of evading by testimony a decision of our own State, but to the decrees of a court of admiralty; decrees formed on the law of nations, and to be judged by a law equally general. It involves the question, how far have *nations* considered themselves *bound by decrees of admiralty*.

What have been the practices and adjudications of nations, with respect to the conclusiveness of a decree?



The determinations of all courts, in every country, consider them as *conclusive*, with the exception of their *proceeding on partial ordinances*, and will not enquire into their merits. (a)

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In *Hughes v. Cornelius*, (b) trover was brought, as in this case, and the court unanimously considered the *decree* as *conclusive*, and would not permit the special verdict to be argued.

In *Bernardi v. Motteux*, (c) the court admitted evidence to prove the property to have been neutral, on the ground, that the *sentence was ambiguous*, and it could not be known from it, *on what ground the condemnation proceeded*. But, in the most unequivocal manner, they declare, that the sentence is *conclusive*, as to every thing within it.

The case of *Barzillai v. Lewis*, (d) and that of *De Souza v. Ewer*, (e) proceeded upon the principle, that on the question of neutrality, "the condemnation, as to the ground it professes to go on, is *conclusive*."

In *Geyer v. Aguilar*, (f) wherein a vessel, for want of a *role d'equipage*, was condemned as enemy's property, the court adjudged this to be conclusive evidence against the warranty of neutrality. This is a very strong case to shew, that though they as men may feel a decision to be unjust, yet as judges they will respect it.

(a) *Park* 353. 6 *Vin.* 535. 1 *Com.* 392. 2 *Woodeson* 456. 3 *Bl.* *Com.* 108. *Peake's L. Ec.* 46 to 54. 1 *Falk.* 32. 2 *Ld. Raym.* 891. *Collect. Jurid.* 191, 193.

(b) 2 *Shew.* [232] 242

(c) *Doug.* [554] 475

(d) *Park* 358.

(e) *Park* 362.

(f) 7 *Term Rep.* 681.

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So, in *Christie v. Secretan*, (g) the same doctrine as to the conclusiveness of a decree is insisted on by the court.

In *Calvert v. Bovill*, (h) the doctrine of the conclusiveness of a sentence is strongly insisted on. "If we can collect from the sentence itself on what ground the foreign court decided, it is *conclusive*, in any action brought in this country."

In *Park* 365, the principles of all the cases mentioned are fairly stated; and it is declared, that *whenever the ground of the decision is manifest, it is conclusive*; but that if a sentence be founded on partial ordinances, the court will not deprive "the insured of his indemnity."

By the English law, the decree of the Exchequer Court is conclusive, when given *in rem*.

On the whole, first, as to admiralty proceedings, they are conclusive always, unless reversed by appeal; secondly, all other judgments are conclusive as to the parties; but, thirdly, fraud may be replied to them by *strangers*. (i)

But, if it is ever proper that fraud should be given in evidence against a decree of admiralty, let us enquire of what description the testimony must be.

It must shew something, that had *weight in the procurement of the adjudication*.

(g) 8 Term Rep. 192.

(h) 7 Term Rep. 527.

(i) 1 Salk. 290, *Blackham's case*. Peake's L. Ev. 51, 54. Amb. 756, *Prudham v. Phillips*.

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These propositions will, then, be insisted on :

1. That every thing, that does not go to prove, or disprove, *the point of contest* before the court, is absolutely *irrelevant*, and ought not to be heard. (*k*)

2. The testimony of *Canfield* was *wholly irrelevant*. It was neither evidence *direct*, nor *leading* to any thing *material*. It proved, that *Stewart* had greatly deceived the confidence of *Canfield*; that he had bought the vessel before the condemnation ; that he had, most probably, found the money ; and was desirous, nay, he had made it his *interest*, that the vessel should be condemned. But what inference can be deduced from this, to shew, that the vessel was not *fairly* condemned? Is not all this consistent with a *fair condemnation* ? If the judge had *jurisdiction of prizes*, and if his proceedings were regular, they cannot be questioned. But, if you do question them, it must be on the ground, that, by some *practice*, he has been *mised*. Nothing of that kind appears. The vessel was captured ; a legal condemnation was had ; and the plaintiffs below offer to impeach it, on the ground, that *fraud was used to procure it*. A fraud may have been practised upon *Canfield* ; but the deposition shews *none* upon the court, in obtaining the decree.

*Edwards*, (of New-Haven) and *Daggett*, for the defendants in error, contended, that though the sentence was conclusive against those who were parties to it ; yet that, in this case, it was competent to prove, that *Stewart*, who justified under it, procured it to be obtained by *fraud*. (*l*)

(*k*) 3 Bla. Com. 367. 2 Bla. Rep. 1165, *Sayre v. Reelford*.

(*l*) 3 Co. 77, *Fermor's case*. 1 Barr. 395, *Bright v. Fynon*.

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The judgment was reversed, CHESTER, AUSTIN, and ALLEN, *Asts.* dissenting.

BY THE COURT. The question, in this case, is, whether a sentence of condemnation of a foreign court, of competent jurisdiction, can be avoided on account of fraud practised in obtaining it, when thus called in question collaterally, in this country ; and the Court are of opinion, that such sentence cannot thus be called in question, but must remain in full force, until avoided in some regular mode, in the country where it passed.

## Mead v. Tomlinson.

In the Court Below,

BENJAMIN MEAD, only surviving partner of the late copartnership of *Oliver Lockwood*, deceased, and said *Mead*, under the firm of *Lockwood & Mead*, Plaintiffs ; ABRAHAM TOMLINSON, Defendant.

An action is not maintainable in favour of a copartnership, on a written instrument, entered into by one of the partners, in his own name only.

THIS action was brought upon certain covenants in a charter-party.

The plaintiff averred, that at the time of executing the charter-party, he and *Lockwood* were merchants in company ; that they were jointly interested in the property, and bound by the contracts, of each ; that all business transacted by either, under whatever name, was, in fact, transacted on their joint account, and for the equal benefit of both ; and particularly, that this charter-party was entered into by *Lockwood*, with the defendant and *William Coggs-hall*, [since deceased] for the joint account and benefit of himself and the plaintiff, which fact was well known to the defendant and *Coggs-hall*.

The defendant, after having prayed oyer of the charter-party, and set it out, from which it appeared, that it was signed by *Lockwood* only, pleaded in abatement, alleging, that the charter-party was entered into by the defendant and *Coggshall*, on the one part, and by *Lockwood*, on the other, and by no other person, or persons, whatsoever; and that the suit, therefore, could be brought only in the name of *Lockwood's* administrator, and not in the name of the plaintiff, as surviving partner.

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The plaintiff replied, affirming over the allegations in declaration respecting the copartnership.

The defendant demurred, and the Superior Court abated the process.

The plaintiff brought a writ of error on that judgment.

*Mills*, (of New-Haven) and *Smith*, (of New-Haven) for the plaintiff, argued, that the copartnership being established, and it being shewn, that the acts of each were binding upon both, enough was shewn to entitle the plaintiff to his action. They cited *Boson v. Sandford*, (a) *Hoare v. Dawes*, (b) *Willet v. Chambers*, (c) *Harrison v. Jackson*, (d) *Coope v. Eyre*, (e) and *Arden v. Sharpe*, (f)

*Edwards*, (of New-Haven) contended, that this being an action of covenant, it could not be supported by *Mead*, on an instrument executed solely by *Lockwood*. However the rule may be, in the case of actions against dormant partners, this action is not maintainable. The

(a) 3 *Lev.* 258. 1 *Show.* 29. 3 *Mod.* 321. 2 *Salk.* 440.(b) *Doug.* 371 [355].(c) *Corp.* 814.(d) 7 *Term Rep.* 207(e) 1 *H. Bl.* 27.(f) 2 *Exp. Rep.* 524

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contrary doctrine would destroy the individuality of partners, and render them incapable of a separate obligation. He cited the case of *Ripley v. Kingsbury*, (a) decided by this Court, in June, 1801.

BY THE WHOLE COURT,

The judgment was affirmed.

(a) This was an action on a promissory note, executed by *Stanley*, in his name only, payable to *Kingsbury*. The declaration stated, that *Ripley* and *Stanley* were merchants in company, under the firm of *Ripley & Stanley*; that *Stanley* was the acting partner; that the company were indebted to the plaintiff on book; and that *Stanley*, as their agent, executed the note, to secure payment of the debt. *Stanley* suffered a default. *Ripley* pleaded the general issue, and went to trial to the jury. The plaintiff obtained a verdict. *Ripley* moved in arrest of judgment, for the insufficiency of the declaration. The Superior Court adjudged the declaration sufficient. On a writ of error to the Supreme Court of Errors, that judgment was reversed.

## Taber v. Packwood.

In the Court below,

JOSEPH PACKWOOD, *Plaintiff*; JOB TABER, executor of *Elizabeth Westcote*, deceased, *Defendant*.

AN action will not lie, for taking and detaining personal property, belonging to the plaintiff, as heir at law of the deceased, before it has been distributed to him, under a regular administration.

THE declaration alleged, that on the 28th of May, 1776, *Phebe Shackmaple* made her last will and testament, by which she devised and bequeathed to *John Packwood* and *Joseph Packwood*, all her estate, of every kind or nature whatsoever, upon condition they should arrive to the age of twenty one years; that she also gave, by the will, the use of said estate to *Elizabeth Westcote*, during her natural life; that said *Phebe*, soon after executing said will, died, leaving personal estate, in money, and other articles, to the amount and

value of 231*l.* 19*s.* 4*d.* that said *Elizabeth* thereupon took the possession and use of the same ; that the *Packwoods* both arrived to the age of twenty one years, and soon afterwards died, *John* dying first, aged twenty three, and then *Joseph*, aged twenty four ; and that the plaintiff is heir at law of *Joseph*, the survivor ; that said *Elizabeth* afterwards made her will, appointed the defendant her executor, and died, in possession of all said property, which came into the hands of the defendant, and which he wrongfully retained, and refused, upon special demand, to deliver to the plaintiff.

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To this declaration the defendant pleaded, that as executor to the last will and testament of said *Elizabeth Westcote*, he did not hold and retain any monies, goods, or estate, which were the property of said *Joseph Packwood*, at his death.

Issue was joined to the Court, who found for the plaintiff, and rendered judgment, that the plaintiff recover of the defendant the sum of \$ 672, and his costs.

The insufficiency of the declaration was assigned for error.

*Ingersoll* and *Gurley*, for the plaintiff in error.

*A. Spalding* and *Hubbard*, for the defendant.

The judgment of the Superior Court was reversed, ELLSWORTH and HILLHOUSE, *Assts.* dissenting.

BY THE COURT. The personal estate, bequeathed in the will of the said *Phebe Shackmaple*, and which is claimed by the defendant in error, in his action, is sub-

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ject to the laws, which respect the administration of the estates of deceased persons, being in the first instance, assets for the payment of debts, if any, and if not, to be distributed to the heirs at law; and, therefore, the right of action, in this case, if an action can be maintained, does not belong to the defendant in error, as heir at law, the only capacity, in which he sues; but to the executors or administrators on the estate of the deceased *John and Joseph Packwood*.

### Gleason v. Chester.

**T**HIS is the same case, which came before this Court, at the last term, and was dismissed, on a plea in abatement, because no final judgment had been rendered therein. (a) At the subsequent term of the Superior Court, the defendant pleaded anew, *not guilty*; the plaintiffs demurred; and final judgment was rendered against them. They now bring a writ of error, alleging, as before, that the Court below ought to have awarded an execution on the verdict, and not ordered a repleader.

*Edwards*, (of New-Haven) and *Pitkin*, for the plaintiffs.

*Daggett* and *Terry*, for the defendants.

This Court reversed the judgment, EDMOND, *Ast.* dissenting, and granted execution for the amount of the verdict and costs, with interest.

BY THE COURT. By the organization of our juridi-

(a) Vide ante, p. 27.

After verdict for the plaintiff, motion in arrest for the insufficiency of the declaration, and judgment for the defendant, and afterwards that judgment reversed, and the cause remanded to be proceeded in according to law, final judgment must be entered upon the verdict.



cal system, on entering an action, after reversal, the plaintiff is entitled to immediate relief, or required further to pursue his remedy, according to the state of his case, on a view of the record. The rights of the parties require, that such view be retrospective so far, and so far only, as the proceedings, on record, appear to have been impugned, by the judgment of reversal. In this case, the certainty and verity of the plaintiffs' declaration appear, by the record, to have been ascertained, in a legal course of judicial proceedings. Their claim appears, on the record, certain, valid, and complete; and it remained, that, on their motion, without further trial, they should have judgment for the sum, found by the jury, in their favour.

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### Lewis v. Wildman.

In the Court below,

EZRA LEWIS, *Plaintiff*; BENJAMIN WILDMAN, *Defendant*.

**T**HIS was an action upon an indenture of apprenticeship, brought by the master against the guardian of the apprentice.

An award by rule of court will not be set aside, unless corruption be shewn in the arbitrators.

The indenture contained a covenant, on the part of the defendant, to secure to the plaintiff the whole of the apprentice's time, till he should arrive at the age of twenty one years. The plaintiff, on his part, covenanted to instruct and support the apprentice. There was also, in the indenture, a provision, that in case of a violation of the covenants by either party, the other should be discharged, and be entitled to damages.

A master to whom an apprentice is bound by indenture, having given him licence to depart, cannot, though he afterwards revoked that licence, maintain an action on the inden-

ture against the guardian, for such departure.

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The breach alleged was, that the apprentice had, by the advice of the defendant, absented himself from the plaintiff's service.

The defendant pleaded *not guilty* ; and by rule of court, the cause was referred to arbitrators, who awarded that the defendant had not broken his covenants.

From the award it appeared, that on the hearing before the arbitrators, the defendant, having admitted the execution of the indenture, and the departure of the apprentice from the service of the plaintiff, offered in evidence a letter written by the plaintiff, and addressed to the defendant, in answer to another letter previously written by the defendant to the plaintiff. The conclusion of the first mentioned letter was in these words : " I was " in hopes you would continue to keep him, [referring " to the apprentice] when he come home ; but I tell " you plainly, that I do not intend to keep him no " longer. If you will come and take him away, very " well ; but if not, I will turn him out o' doors very " soon ; for I will not have so saucy a boy in my house." This letter was objected to by the plaintiff, as being inadmissible ; but the arbitrators permitted the defendant to read it in his defence. It also appeared, that after writing this letter, the plaintiff forbade the defendant to take away the apprentice.

To the acceptance of this award the plaintiff remonstrated. The Court accepted the award, and rendered judgment for the defendant.

*Ingersoll* and *Mills*, (of New-Haven) for the plaintiff, contended, that this evidence was inadmissible, because

it proved, if any thing, an act of the party, which should have been pleaded under our statute.

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Again, the letter only proved, that the master was willing the apprentice should go ; but yet when called upon, he refused to let him go. It, therefore, could not be considered as a dissolution of the indenture.

They further said, that these things appearing on the face of the award, in which the letter was recited, a foundation was laid for enquiry before the Court, as to the validity of the award. (a)

*Smith*, (of Woodbury) and *Smith*, (of New-Haven) contended, that an award is conclusive upon the parties, unless corruption in the arbitrators be proved.

They also urged, that the letter contained a licence to the apprentice to depart, and that after such licence the master could not regain him. (b)

BY THE WHOLE COURT,

The judgment was affirmed.

(a) 1 *Bla. Rep.* 363, *Montefiori v. Montefiori*. Kirby 353, *Parker v. Avery*. 1 *Root* 212, *Waterbury v. Waterbury*. 3 *Atk.* 462, [494,] Case there cited.

(b) 1 *Rol. Abr.* 455. 4 *Com. Dig.* 582. 6 *Mod.* 70. *Anon.*

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## Pollard v. Lyman.

In the Court below,

JOSEPH LYMAN, MOSES BLISS, JONATHAN DWIGHT, JOHN HOOKER, GEORGE BLISS, JOSEPH WILLIAMS, WILLIAM SMITH, JAMES S. DWIGHT, DANIEL LOMBARD, JONATHAN DWIGHT, jun. WORTHINGTON HOOKER, WILLIAM ELY, DAVID KING, EBENEZER KING, jun. and GIDEON GRANGER, *Petitioners*; ROBERT POLLARD and GEORGE PICKETT, *Respondents*.

**T**HIS was a petition in chancery to the Superior Court.

The respondents' answer to a bill in chancery, praying for a disclosure, is conclusive as to the facts stated therein. Mere loss in a bargain, resulting not from fraud, nor the failure of a warranty, is not a ground of relief.

The doctrine of implied warranty does not apply to lands. Failure of consideration, where the consideration stipulated is received, affords no ground of relief.

The petitioners stated, that on the 5th of December, 1795, they severally advanced to *William Ely* certain sums of money, amounting, with the sum to be furnished by him, to \$14,411, and authorized him, by a letter of attorney, to vest the same in such purchases of good unlocated, or uncultivated lands, in Virginia, as he thought would best promote the interest of the person advancing the money as aforesaid; and also authorized him, in case he deemed it for the interest of his principal, to bind him to pay his proportional share of the purchase money; that the petitioners severally gave orders to *Ely* to take all conveyances of the lands, which he should purchase, for them respectively, in the names of *Jonathan Dwight, John Hooker, George Bliss, and Gideon Granger, jun.* which they were to hold for the benefit of the proprietors; that *Ely* proceeded directly to Virginia, and effected various purchases of lands lying in that State, for the benefit of the petitioners, within the power and according to the authority to him given as aforesaid; that while he remained there, the respondents applied to him, and proposed to sell him 150,000

acres of land, which they represented as lying in the County of Wythe, in Virginia, and described the same by particular metes and bounds; that they affirmed to *Ely*, to induce him to purchase, that they had a good and indefeasible title to these lands, and that the same were situated in the midst of a well settled country, and were taken up by an early location, at a time, when there was a great tract of vacant lands, in that part of the State, so that the person locating the same had a great opportunity to select a tract of good and valuable lands, and that said tract of 150,000 acres was of great value; that still further to induce *Ely* to purchase this tract, they laid before him a highly finished map or chart, with various fine rivers and streams delineated thereon, as watering the tract and greatly fertilizing the land, all leading through and off from the same, and connecting themselves with other great rivers in the State, thereby forming a most easy access to said lands, and almost every part thereof, and also affording a ready, cheap, and convenient communication from said tract of land to various other parts of the State, and elsewhere, which map or chart the respondents affirmed to *Ely* was a true and just representation of the said lands, and of the waters upon the same; that *Ely*, induced by these representations, and believing them to be true, on the 12th of March, 1796, purchased of the respondents the aforesaid tract of land, for which he agreed to give them \$ 16,500 payable in three instalments of \$ 5,500 each, and to secure the payment thereof, on the 23th of March, 1796, he executed and delivered to them three several bonds, for \$ 5,500 each, one payable on the 10th of June, 1796, another on the 12th of March, 1797, and the other on the 12th of March, 1798; and that, on the same 12th of March, 1796, the respondents, by their warranty deed, undertook to convey said lands to said *Dwight*,

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*Hooker, Bliss, and Granger*, for the benefit of the petitioners.

The petitioners also stated, that they had paid to the respondents the two first mentioned bonds, amounting, with the interest thereon, to \$13,057 50; and that on the other bond, the respondents had commenced a suit, before the Hartford County Court, which they were attempting to press into judgment.

The petitioners then averred, that the respondents never had any legal title to the said 150,000 acres of land, or to any part thereof; that the lands are not, and cannot be, of any value whatever; that they are altogether deficient from the description given of them to *Ely*, at the time of the purchase, for that the same lands are a mere pile of stupendous, inaccessible mountains, wholly incapable of settlement, and even incapable of being surveyed; that the map shewn to *Ely* is an unfair and totally false representation of the property, with respect to the waters on the same, their location, and courses, for that many of the streams never had existence, and the courses of others, if the tumbling of water from one huge precipice to another merit the appellation of a water-course, are wholly deficient from the representations of the map; and that these facts the respondents well knew, but concealed them from the knowledge of *Ely*, and the rest of the petitioners, with an intent to decoy him into the purchase of said lands.

The petitioners further stated, that the respondents were bankrupts, or, at least, in failing circumstances; that the petitioners could not have process of law upon the covenants in said deed, before any court of law in this State, nor could damages be recovered, before any

court of law whatever, for the defect of value in said lands, upon any suit to be brought on said covenants; that in the peculiar situation of the petitioners, it would ruin them to pay the money demanded by the respondents, and seek redress in a distant court; that the petitioners had no defence at law, in said suit, and could have no relief, unless by the interposition of a court of chancery.

The bill, after reciting that the facts stated therein rested only within the knowledge of the respondents and the petitioners, prayed, that the respondents might be compelled to disclose, on oath, all their knowledge with respect to the same.

The petitioners concluded their bill, by praying for a perpetual injunction on the bond in suit, and for a restoration of the money, that had been paid on the other bonds, together with interest.

The disclosure was ordered, was regularly made before commissioners in Virginia, and was returned to the Court, and became parcel of the record.

In the disclosure, the respondents say, that in the year 1795, they became acquainted with *Ely*; that in the summer of that year, he went from Richmond to Kentucky, and returned through the County of Wythe; that after his return, he particularly described to the respondents the lands in that County, and represented them as extremely valuable; that the respondents, observing him to be particularly pleased with that part of the country, and having a tract of land, containing 150,000 acres, lying there, for which they had paid a valuable consideration, offered to sell the same to him, infor-

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ning him, that they knew nothing of the quality of that particular tract, nor had they, or either of them, any particular knowledge of that part of the country, neither of them, at that time, having been within one hundred and fifty miles of it, but observing, that the title being guarantied to them, by a responsible person, and having obtained a grant for the same from the Commonwealth of Virginia, they would, on obtaining a satisfactory price, undertake to give a deed, in fee-simple, with a general warranty; that in order to satisfy *Ely* with respect to the actual shape, and, as far as they could, with respect to the relative situation of said tract, they procured, from the register of the Land-Office, a copy of the plat, and certificate of the survey, as returned by the surveyor of the County of Wythe, in which were inserted not only the shape, and boundaries of said tract, with the water-courses, which passed through it, but the date of the entry, and the time when the survey was made; that this was a true copy of the plat and certificate of survey, which the respondents bought for a valuable consideration, and shewed it to *Ely*, without any colouring given to it by them; and, that if there be any inaccuracy, or uncertainty therein, it is not justly imputable to them. They deny that they knew any thing of the actual or intrinsic value of the land, and aver, that they never informed *Ely* any thing relative thereto, nor gave him any other information with regard to its situation, than what the plat and certificate of survey exhibited; but from the solicitude expressed by him to become the purchaser, and from his having passed through the County of Wythe, they did believe he was possessed of much better information on the subject, than they possessed. They also aver, that *Ely* appeared to be satisfied with his own knowledge, as to the situation, quality, and value of the land; and that he



did not enquire relative thereto ; and discovered no solicitude, except as to the title only.

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The respondents admit, that they informed *Ely*, that they had a good title to the land, and were seized of the same in fee-simple, and aver, that such were the facts ; they admit, that *Ely* made the purchase as set forth in the petition, but deny that he was induced thereto in consequence of any representations relative to the value of the land, or any other promise or assurance, made by them, or either of them, other than their agreement to warrant the title ; they also admit, that they did execute a deed of said tract of land, in fee-simple, with a general warranty, to the persons named in the bill, for the use and benefit of the petitioners, and that, by the tenor of that deed, they are bound to make good any deficiency, which there may be in quantity, in said tract, and also to defend the title ; they further admit the execution of the bonds, the satisfaction of two of them, and the pendency of a suit on the other to enforce a collection. The respondents conclude their answer, by a positive denial of all fraud and combination, and of any knowledge of fraud and combination, and pray to be dismissed with their costs.

To this answer the general replication was filed.

The Superior Court thereupon proceeded to hear the cause, and then made and passed the following judgment and decree : “ The Court do find, that said *Ely* “ did purchase said tract of land, containing 150,000 “ acres, of said *Pollard* and *Pickett*, as stated in said petition ; that the petitioners did severally furnish money “ for said *Ely*, to pay it to him in the proportions, and “ upon the terms, and under the agreements, set forth

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“ in said petition, and are interested in said land, in  
“ proportion severally to the sums of money by them ad-  
“ advanced as aforesaid. And the Court do find, that  
“ said lands sold by the respondents to said *Ely*, were  
“ represented, and held out to said *Ely*, by the respon-  
“ dents, at the time of said purchase, as being of great  
“ value, in point of quality, and their relative situation  
“ with other lands in said County of Wythe, which said  
“ *Ely* had viewed, and which were valuable for settle-  
“ ments. And the Court do find, that a plan or survey  
“ of said lands sold by the respondents to said *Ely*, im-  
“ porting the same to be of good quality and situation,  
“ was shewn to said *Ely*, by said *Pollard* and *Pickett*, at  
“ the time of said sale, as is set forth in said petition.  
“ And the Court do find, that the said plan or survey  
“ was not made by any actual survey ; and that the lines  
“ of said tract sold to said *Ely* as aforesaid, were never  
“ run out, nor surveyed ; and that the said plan or sur-  
“ vey imported, on the face of it, a falshood. And the  
“ Court do find, that the lands sold by the respondents  
“ to said *Ely*, as set forth in said petition, were not, at  
“ the time of said sale, and are not, now, of any value  
“ whatever. And the Court do find that the said three  
“ bonds, mentioned in said petition, were given by the  
“ petitioners, as the consideration of said purchase made  
“ by said *Ely* of the respondents ; and that two of said  
“ bonds have been paid ; and that a suit is now depen-  
“ ding, on the other bond, which hath not been paid, in  
“ the County Court of Hartford County, all as stated in  
“ said petition. And the Court find, that as to any de-  
“ fect in the title, derived to the petitioners from said  
“ purchase of said *Pollard* and *Pickett*, the petitioners  
“ have adequate remedy at law, upon the covenants in  
“ said deed from said *Pollard* and *Pickett*, it appearing to  
“ the Court, that said *Pollard* and *Pickett* are able to res-

“ pond any damages, that may be recovered of them, in  
 “ any suit upon the covenants of said deed.

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“ Whereupon, it is ordered and decreed, by this  
 “ Court, that said *Pollard* and *Pickett*, their counsel, and  
 “ attornies, be perpetually enjoined from further procees-  
 “ dings in said suit upon said bond, in said Hartford  
 “ County Court, and from commencing and prosecuting  
 “ any other suit upon said bond. And it is further de-  
 “ creed and ordered by this Court, that upon the peti-  
 “ tioners executing to said *Pollard* and *Pickett*, their  
 “ heirs, &c. conformable to the laws of said State of Vir-  
 “ ginia, releasing to said *Pollard* and *Pickett*, their heirs,  
 “ &c. all the right and title to said lands purchased of  
 “ said *Pollard* and *Pickett* as aforesaid, by said *Ely*, which  
 “ the petitioners derived from said *Pollard* and *Pickett*,  
 “ by virtue of said conveyance from them, as stated in  
 “ said petition as aforesaid, and lodging the same with  
 “ the clerk of this Court, on or before the 17th of Feb-  
 “ ruary, 1803, to be by said clerk delivered to said *Pol-*  
 “ *lard* and *Pickett*, upon their complying with this decree,  
 “ they the said *Pollard* and *Pickett* shall, on or before the  
 “ 1st of July, 1803, deliver up said bond, on which  
 “ said suit is brought, to the clerk of this Court, to be  
 “ cancelled, and shall pay to the clerk of this Court, for  
 “ the use of the petitioners, the sum of \$ 14,876 50,  
 “ and interest thereon from this time till the same shall  
 “ be paid ; and upon the failure of said *Pollard* and *Pick-*  
 “ *ett* to comply with this decree, upon the condition, and  
 “ by the time aforesaid, they shall forfeit and pay to the  
 “ petitioners, the sum of \$ 30,000, to be recovered of  
 “ them, the said *Pollard* and *Pickett*, according to law.  
 “ And it is further decreed by this Court, that the peti-  
 “ tioners do recover of the said *Pollard* and *Pickett*  
 “ their costs.”

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The respondents brought a writ of error to this Court, and assigned the general errors.

*Benson*, (of New-York) and *Daggett*, for the plaintiffs in error, contended,

1. That the Superior Court could not, by law, find the facts, which they declare found. The finding contains not only facts, which are not alleged in the petition, or confessed by the answer, but also such as are expressly denied by the answer. But the answer is conclusive upon the petitioners, and no evidence can be admitted to contradict it. To this point *Butler v. Catling*, (a) 1 *Root* 582, and 2 *Swift* 475, were cited.

2. That the facts, which appear found, do not warrant the decree. No *fraud* on the part of the respondents, or *science* that the representations made by them were *false*, though charged in the bill, is found by the Court. But that mere *falsehoods* were held out to the petitioners, without any fraudulent intention in the respondents, and with no more knowledge of the thing contracted about, than the petitioners themselves had, is not sufficient to entitle them to relief. (b)

This was a bargain of *hazard*. The price was but *eleven cents an acre*, for lands in a settled county, through which the purchaser had lately travelled. It was evidently the intention of the parties to *speculate*.

That even this price, as events have shewn, is far above the value of the land, affords no ground of re-

(a) 1 *Root* 510.

(b) 1 *Proc. Cont.* 141.

lief. Inadequacy of price may be *evidence of fraud*; but fraud will then be found. (c)

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3. That the petitioners had adequate remedy at law. (d)

*Edwards*, (of New-Haven) and *Hosmer*, for the defendants in error.

BY THE COURT. The disclosure, which admitted none of the facts alleged as fraudulent, and denied them all, was conclusive with respect to those facts.

Chancery power to compel a disclosure, has, by the practice of this State, from the beginning, been limited to the case of there being no other evidence. To have extended it further would have been an unnecessary departure from the common law, and an unnecessary exposure to imminent danger of perjury. A plaintiff, therefore, to entitle himself to a discovery, avers in his bill, that the facts respecting which he prays a disclosure, rest solely in the knowledge of the defendant, or of the defendant and himself; and to permit him, after disclosure is obtained, to produce other evidence in proof of those facts, is to permit him to falsify himself, and to trifle with the Court, and the conscience of his adversary.

The Court having found that *Pollard* and *Pickett* were able to respond any damages, that might be recovered of them, in any suit upon the covenants of the deed, if they had been broken, the question of the title was laid out of the case.

(c) As to "*Unreasonableness*," vide 2 *Pow. Cont.* 143, 4, 5. "*Inadequacy*," 2 *Pow. Cont.* 152. "*Exorbitancy*," 2 *Pow. Cont.* 228.

(d) 2 *Root* 338. *Willett v. Overton*. 2 *Gen.* 324. *Mj.* 164, 5, 6. *Kirby* 175, *Lothrop v. Beneset*.

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They further found, that the lands sold to *Ely* were, at the time of the purchase, *represented* and *held out* to him, by the respondents, as being of great value, in point of quality, and their relative situation with the lands in the County of Wythe, which he had viewed, and which were valuable for settlements. If “*represented* and *held out*, as being of great value,” mean any thing more than the exhibition of the plan, which is included in the next finding;—if it mean, that *Pollard* and *Pickett* affirmed the lands to be of a great value, or that they were located in the midst of a well settled country,—the affirmations alleged in the bill, and which the disclosure had denied,—the finding must have been without evidence, or upon evidence which was inadmissible, and inoperative.

The only defects, or misrepresentations of the plan, specifically charged in the bill, were, that it delineated many water-courses, well interspersed, and connected with rivers of extensive communication, some of which water-courses did not, in fact, exist, and others were misplaced; and, that it represented the land to be of great value, when, in fact, it was of no value. That the plan represented the land to be of great value, otherwise than by a demarcation of water-courses, which might create a presumption of fertility, and of easy access, was not alleged. Nor does it appear, from the finding of the Court, that the demarcation of the water-courses, was, at all, incorrect; the finding is silent with respect to them. And as to any facts found respecting the plan, which were not charged so specifically, that the adverse party had notice to contest them, it is not material what they amount to. It may be proper, however, to notice, that whatever misrepresentations the plan may have contained, it was not found, that *Ely* was

induced by it to purchase, nor that *Pollard* and *Pickett* knew it to be incorrect, or had any agency in making it, or procuring it to be made ; and, indeed, the reverse of all these facts is apparent from the disclosure, so that the allegation wholly fails.

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The Court further, and finally, found, that the land was of no value.

Mere loss in a bargain,—loss resulting not from fraud, nor the failure of a warranty, but from bad calculation, or the want of vigilance, is not a ground for relief. It could not be admitted as a ground, without rendering all express contracts futile.

As to the doctrine of implied warranty, that the article sold is of the ordinary quality of articles of its kind, or equal throughout to the sample seen, it applies only to articles susceptible of a standard quality, or which are sold by samples, and does not extend to lands which have no standard quality, and must depend, for their value, on a variety of circumstances, none of which are reducible to a common measure. Nor does the doctrine of the failure of the consideration reach this case. It reaches no case, where the purchaser obtains the article contracted for, and the purchase was not induced by fraud, nor the quality of the article warranted. It is *not having* the stipulated consideration, and not its *want of value*, which the doctrine respects. In this case, it must be understood, as there is nothing either expressed or implied to the contrary, that the purchaser took upon himself the risque of the quality, or value, of the land, which he improvidently purchased unseen. And as to fraud, it does not appear, that the seller practised any address whatever ; though it is not every species of ad-

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dress that vitiates a contract. If the address be such only as the purchaser, by due diligence and circumspection, might guard himself against,—that is to say, such diligence and circumspection, as in the ordinary course of business usually accompany similar transactions, he is without remedy.

There not appearing, then, from the record, any sufficient ground to warrant the decree of the Superior Court, it is reversed.

### Smith v. Rhoades.

In the Court below,

JOHN SMITH, *Plaintiff*; ELEAZER RHOADES, *Defendant*.

**T**HIS was an action of debt, brought on a judgment, recovered by the present plaintiff, against the present defendant, before the Court of Common Pleas, in the County of Hampshire, and Commonwealth of Massachusetts.

A. brings an action on a judgment recovered against B. in Massachusetts; B. pleads that, at the time the suit was commenced, upon which that judgment was founded, he was not an inhabitant of Massachusetts, nor did he reside there, nor had he any property there; this plea is bad, because it does not deny actual, or legal, notice.

Plea in bar, that the defendant, at the time the suit was instituted against him, on which the judgment declared upon was founded, was an inhabitant of this State, residing in the Town of Sterling, and was not an inhabitant of the Commonwealth of Massachusetts, and did not reside within the jurisdiction thereof, and was not subject to the jurisdiction of any court sitting under the authority thereof; nor had he then, or at any time during the pendency of said suit, any lands, estate, property, effects or credits, in said Commonwealth, or subject to the jurisdiction thereof, or of any court sitting under the authority thereof.



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To this plea the plaintiff replied, that for a long time before the date of the writ, on which the judgment aforesaid was founded; and also when said writ was served, the defendant was an inhabitant of, and did actually reside in, the Town of Partridgefield, in said Commonwealth, and had estate, both real and personal, in said Town, and within the jurisdiction of said Court of Common Pleas; that said suit was instituted, and served on the defendant, according to the laws of said Commonwealth; that he had legal, and actual, notice; and that he employed counsel, who, in pursuance of his instructions, appeared in the case, and made defence therein, in his behalf. The replication concluded, by traversing the fact, that the defendant, at the time when said suit was instituted, was a citizen of this State, residing in the Town of Sterling.

To this replication there was a general demurrer; and judgment, by the Court, that the replication was insufficient.

Error was assigned generally.

*Ingersoll*, for the plaintiff in error.

*Smith*, (of New-Haven) for the defendant.

The judgment was reversed, unanimously.

BY THE COURT. The defendant's plea in bar is insufficient, for that in said plea there is no averment of the want of legal notice of said suit.

The courts of justice, in the respective States, are open to all persons, who apply for the trial of causes, and the

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administration of justice, on questions of right, provided they are legally brought before them. In the defendant's plea, it does not appear, but that he was found within the jurisdiction of the Court of Common Pleas, in the County of Hampshire, and was duly notified of the process. The plaintiff, in his replication, avers, that the defendant had such notice, that he appeared before said Court, submitted to the jurisdiction, and defended in the suit. These facts are not denied, but acknowledged, by the defendant's rejoinder. It is to be presumed also, from the record, that the defendant was legally served with process, within the State of Massachusetts; and that, in consequence thereof, he voluntarily appeared, and submitted his cause to the decision of said Court. No good reason, therefore, is perceived, why he should not be bound thereby.

### Bush v. Sheldon.

In the Court below,

RODERICK SHELTON, *Plaintiff*; DANIEL BUSH, and  
ABIEL BUSH, *Defendants*.

A decree of a Court of Probate is conclusive upon the parties, until disaffirmed on appeal, or set aside in due course of law, and cannot be enquired into collaterally.

**T**HIS was an action of ejectment.

The plaintiffs claimed as heir to *Daniel Sheldon*, deceased. *Isaac Sheldon*, as administrator, procured commissioners to be appointed on the estate of said *Daniel Sheldon*, and, on their report, the Court of Probate, in 1785, ordered all his estate to be sold. Under this order, the administrator, in 1786, sold the land in question, at public vendue, to *Daniel Seymour*, who, on the same day, reconveyed the land to him. On the death of *Isaac Sheldon*, in 1786, the land descended to *Anna*

*Goodwin.* In 1791, *Anna Goodwin* sold the land, for a valuable consideration, to *Samuel Smith*, of whom the defendants, in 1800, purchased the same, without notice of any of these transactions.

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On trial to the jury, the plaintiff, to destroy the title of the defendants, offered to prove fraud in the administrator in selling without any necessity, and thus collaterally to oppugn the decree of Probate ordering the sale. This evidence was objected to, but the Court admitted it, and a verdict was found for the plaintiff. The defendants filed their bill of exceptions, and brought a writ of error, assigning the admission of that evidence for cause of error.

*Perkins*, (of Hartford) and *Gould*, for the plaintiffs in error, contended, that the decree of the Court of Probate ordering the sale is conclusive upon all persons, who are considered as parties thereto. The plaintiff below being one of the heirs of *Daniel Sheldon* might have appeared, and been heard on the decree. If aggrieved thereby, he might have appealed to the Superior Court. He, therefore, is a party to the decree. If such decrees while they remain in force, are not conclusive upon the parties, the proceedings of the Court of Probate are nugatory; for of what use is a decree, which does not bind those who are parties to it?

It was admitted, as a general principle, that persons who are not parties to the judgment or decree of a court, may shew, that such judgment or decree was fraudulent, and void, as to them. But a distinction was taken between the condition of third persons, and of parties, in this respect.

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In support of the doctrine contended for, by the plaintiffs in error, and to shew, that it is applicable to the decrees of Courts of Probate, the following cases were cited : *Rex v. Vincent*, (a) *Raine's case*, (b) and *Noel v. Wells*. (c)

It was also contended, that if the decree of the Court of Probate was fraudulently obtained, it ought not to effect the plaintiffs in error, who were *bonâ fide* purchasers, for a valuable consideration, without notice of any such fraud ; and that, therefore, the evidence excepted to ought not to have been admitted. (d)

*Allen and Dwight*, for the defendant in error, contended, that fraud vitiates every transaction ;—that a deed made by an administrator, who practices a fraud is absolutely void, and may be set aside. (e)

They also insisted, that this land was not inventoried, and, therefore, not within the jurisdiction of the Judge of Probate. (f)

THE COURT reversed the judgment, unanimously, on the ground, that the decree of Probate could not be enquired into, and revised, thus collaterally.

(a) 1 *Stra.* 481.(b) 1 *Ld. Raym.* 262.(c) 1 *Lev.* 235.(d) 2 *Root* 359, *Lee v. Albee*.(e) 1 *Com. Dig.* 163 1 *F. H. N. B.* 97, *let. C.* 1 *Eq. Ca. ab.* 332.

(f) The inventory mentioned in the decree of Probate was several years prior to the order of sale. It did not, however, appear to the Court, that the land was not inventoried.

## Lloyd v. Bull.

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In the Court below,

THOMAS LLOYD, Jun. *Petitioner*; MICHAEL BULL and  
THOMAS BULL, *Respondents*.

**T**HIS was a petition in chancery, brought to the Superior Court, in February, 1799, the prayer of which was, that certain sums of money, which the petitioner had paid to the respondents, should be refunded, and that certain promissory notes, which he had executed to them, should be cancelled.

The facts, stated in the petition and answer, and found by the Court, are—That on the 20th of February, 1796, it was agreed between the petitioner and the respondents, that the latter should sell and convey to the former 150,000 twelve hundred thousandth parts of the Connecticut Western Reserve, at the price of \$ 30,000 ; that the petitioner should pay to the respondents \$ 3,000, on the 1st of January, 1797 ; that within six months, he should procure satisfactory security for the payment of \$ 12,000, on the 2d of September, 1800, and the interest, annually, from the 2d of September, 1797 ; that he should pay the remaining sum of \$ 15,000, on the 2d of November, 1800 ; that the respondents should hold the land, in their hands, for his benefit, until the last mentioned sum should be actually paid ; that they should, whenever partition should be made of the Western Reserve, in their own names, but for the sole use and benefit of the petitioner, draw for the said proportion of land, according to the mode pointed out, by the Connecticut Land

Under an agreement between A. and B. for the purchase of 150,000 acres of Connecticut Western Reserve land, A. gives his notes, payable at different times then future, for the purchase money ; B. gives bonds to draw for the land with the Land Company, and to hold the tract drawn, and, at a specified time, if A. previously paid the notes, to convey the same to him ; A. pays a part of the money, but not the whole ; B. conveys the land to C. upon a contract, that C. should reconvey the same, before the time of drawing ; A. with notice of that conveyance, enters into a contract

with C. the object of which is to save C. upon certain conditions, from the obligation of reconveying to B. C. though he fails to perform the conditions in his contract with A. neglects to reconvey to B. and B. neglects to draw ; held that A. is not entitled to relief in chancery against the notes.

1803. Company ; that they should, at his request, convey the same to him, when said conditions should be performed ; and that he should pay all the taxes, which should be assessed thereon.

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It was also stated and found, that on the 5th of May, 1796, the petitioner, in pursuance of his part of the agreement, executed his note to the respondents for \$ 12,000, payable on the 2d of September, 1800, and three other notes for \$ 720 each, for the interest, payable as the interest would become due, and procured *Oliver Phelps Esq.* who was approved of by the respondents, to guarantee the payments ; and that on the 1st of January, 1797, the petitioner paid to the respondents \$ 3,000, and afterwards paid \$ 350 for taxes, assessed on said land, which was placed to the credit thereof, in the books of said Land Company.

It also appeared, that on the 3d of October, 1797, the respondents, with *James Bull* as surety, executed three bonds, all of the same tenour, in the penal sum of \$ 30,000 each, to the petitioner, binding the respondents, upon the petitioner's performing the agreement as before stated, on his part, to perform the same, on their part ; but that, before the execution of those bonds, they had, without the knowledge of the petitioner, transferred to *Ephraim Root*, *Jonathan Woodward*, and *John Bishop*, for the benefit of said *Bishop*, 12,640 twelve hundred thousandth parts of said Western Reserve, upon a contract between the respondents and *Bishop*, that he should, transfer to the respondents the same quantity of land, on or before the 26th of November, 1797,—or, in case the Land Company should make partition before that time, within ten days before such partition should be made, in order that the respondents might draw for 15,000 twelve

hundred thousandth parts of the Western Reserve, in pursuance of their contract with the petitioner.

It was also found by the Court, that on the 15th of February, 1798, the petitioner, well knowing that the respondents had made said transfer to *Bishop*, in order to save *Bishop* from the necessity and obligation of transferring said land to the respondents in pursuance of his contract with them, entered into a written contract with *Bishop*, in which it was stipulated, after counting upon the bonds executed by the respondents to the petitioner, and the notes executed by the petitioner to the respondents, that if *Bishop* should, on or before the 26th of May, 1798; discharge to the respondents, and exonerate the petitioner from \$ 10,128, parcel of the note for \$ 12,000, and \$ 607 4, on each of the other three notes,—and either give the petitioner satisfactory security, on or before the 26th July, 1798, to pay to the petitioner \$ 5,064, on the 2d of September, 1800, with interest annually from the 2d of September, 1797, until paid, or pay to the petitioner \$ 2,532, on or before the 26th of July, 1798,—and pay to the petitioner, on or before the 26th of July, 1798, so much of the taxes, which the petitioner had paid, as is in the proportion of 12,660 to 15,000 ;—then *Bishop* should be entitled to receive and take benefit of the aforesaid three bonds, in the proportion of \$ 12,660 to 2,340, and the petitioner would accordingly assign to *Bishop* such proportion thereof. *Bishop* then covenanted, on his part, that he would comply with and perform all the foregoing conditions ; or, would, on or before the 26th of July, 1798, pay to the petitioner \$ 1,440, and convey to the respondents 12,660 twelve hundred thousandths of the undivided part of the Western Reserve; and also so much of the divided part, as is, upon an average of all the drafts, equal to 12,660 twelve hundred

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1803. thousandths thereof, *Ephraim Root* Esq. and *William*  
 LLOYD *Shepard*, jun. being the judges of such average. Ap-  
 v. pended to this contract there was a further agreement,  
 BULL. to this effect : That if *Bishop* should cancel to the re-  
 spondents the proportion before mentioned, on the four  
 notes, (which would be \$ 11,951) and should then choose  
 to return the land, the petitioner would, upon *Bishop's*  
 paying \$79 more, make satisfactory security to the re-  
 spondents, or to *Bishop*, for the sums so cancelled.

The Court further found, that partition of the Western Reserve lands was made on the 23d, 24th, and 25th of January, 1798 ; that the respondents having transferred 12,640 twelve hundred thousandths to *Bishop*, the remainder of the 15,000 twelve hundred thousandths only was drawn for, by the respondents ; that they had no other shares in said land, and by the books of the Company it appeared, that they had no right to make any other drafts in said partition ; that the petitioner did not make payment of the sum stipulated to be paid for said lands, and mentioned in the bonds, by the 2d of November, 1800, nor hath he since paid the same ; that *Bishop* did not perform his agreement with the petitioner ; and that the respondents, on the 1st of November, 1800, offered to convey to the petitioner 15,000 twelve hundred thousandth parts of the Western Reserve lands, on the petitioner's making to the respondents the payments, and performing the stipulations, on the part of the petitioner first to be performed, and still stand ready, and offer, to do the same.

The Court thereupon gave judgment, that the petitioner take nothing by his petition.

The general error was assigned.



*Edwards*, (of New-Haven) and *Terry*, for the plaintiff.

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1. The petitioner is entitled to relief. The *Bulls*, by not drawing for the land, at the time of partition, have broken their contract, at law. As soon as the drawing had passed by, *Lloyd* might have brought his suits upon the bonds. There was a present breach, and he was entitled to an immediate remedy. (a) Further, the *Bulls* agreed to draw, and *hold in trust* for *Lloyd*; there was, therefore, a breach in not holding; and this a breach of trust, which affords a distinct ground of relief.

2. The remedy prayed for is the proper one. Adequate remedy can be had only in chancery. The contract was for the purchase of land. A party has a right to the specific thing contracted for; but the *Bulls*, in this case, have disabled themselves to perform specifically. The contract, therefore, ought to be rescinded as to both parties. (b) It would be worse than futile, to compel *Lloyd* to pay the money on the notes, only that he might recover it back in a suit on the bonds.

*Goodrich*, (of Hartford) and *Dwight*, for the defendants.

1. If the petitioner has merits, he has complete remedy at law, as he holds three bonds, executed by the *Bulls*, amounting to \$90,000, in which the whole contract between him and them is set forth, and which were taken, by him, for the very purpose of enforcing a perform-

(a) *Co. Lit. Sect.* 355, 6, 7, 8. 5 *Co.* 206, *Mayne's case*. 1 *Hen. Bl.* 270. *St. Albans v. Sher.*

(b) 1 *Fon. Eq.* 141. 2 *Ves.* 538, *Chilliner v. Chilliner*. 2 *P. Wms.* 191, *Hobson v. Trevor*. 3 *P. Wms.* 183, *Hail v. Hardy*. 1 *Br. C. C.* 418, *Sloman v. Walter*. 10 *Mod.* 517, *Park v. Wilson*. 1 *Proc. Con.* 314.

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ance of that contract, on the part of the *Bulls*. The same acts or omissions, which are a breach of the contract, are also a breach of the bonds.

2. There has been no breach of the contract. No particular lands were specified by the parties. *Lloyd* contracted only for a certain proportion of the Western Reserve. The *Bulls* might buy lands to fulfil their agreement; and if, when the specified period arrived, they transferred, or offered to transfer, it was a substantial performance.

Further, the conduct of *Lloyd* shews clearly, that he did not consider either the transfer by the *Bulls* to *Bishop*, or their neglect to draw, as a breach of the contract. From the record it appears, that *Bishop* contracted with the *Bulls* to return the land, before the time of partition; that this was known to *Lloyd*; and that *Lloyd* afterwards entered into a contract with *Bishop*, the object of which was, *to save Bishop from the necessity, and obligation of returning the land*. That this was the motive, which induced the parties to make the contract, is evident, as well from the contract itself, as from the finding of the Court.

Again, *Lloyd* contracted with *Bishop* to sell him the benefit of his contract with the *Bulls*, so far as it respected the amount of land, which the *Bulls* had transferred to *Bishop*. (c) This implies, that *Lloyd's* contract with the *Bulls* was not discharged, by the failure to draw; for it was *three weeks after the partition*.

(c) The *Bulls* conveyed to *Bishop* 12,640 twelve hundred thousandths. *Lloyd* agreed to assign to *Bishop* such a proportion of the bonds as 12,660 bears to 2,340;—probably a mistake for 12,640 to 2,360, the 6 and the 4 in the tens' place of the two numbers being transposed.

Again, the contract was, that *Bishop* should exonerate *Lloyd* from a certain proportion of his payments to the *Bulls*. Now, if, by failing to draw, *Lloyd* was discharged from his contract, why does he contract with *Bishop* to take him off with the *Bulls*?

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But, further, *Bishop* was to be discharged from his engagements in the contract, upon paying *Lloyd* \$ 1,440 and returning to the *Bulls* the same quantity of land, which they had conveyed to him, on or before the 26th of July, 1798. *Lloyd* here authorized *Bishop*, for a premium, to reconvey six months after the drawing. He also fixed upon the quality of the land to be returned, and named referees to judge whether it was equal to the standard. Is not this, at least, an implied agreement not to take advantage of the failure to draw?

Further, in the subjoined clause to the contract, *Lloyd* expressly covenants, that, in case *Bishop* should, agreeably to one part of his agreement, cancel certain sums on *Lloyd's* notes to the *Bulls*, and then should choose to return the land, (by July, 1798) *Lloyd* would, upon *Bishop's* paying him \$ 79 more, make satisfactory security, either to the *Bulls*, or to *Bishop*, for the sums so cancelled.

Finally, *Lloyd* may now sue *Bishop* on the covenants in the contract. If he should, *Bishop* may compel *Lloyd* to convey. If so, how can the Court rescind the contract between *Lloyd* and the *Bulls*?

The *Counsel* for the plaintiff, in reply, urged, that the *Bulls* could not avail themselves of the contract between *Lloyd* and *Bishop*. They were neither privies nor parties to it.

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Again, the contract with *Bishop* was made after the *Bulls* had disabled themselves to perform. *Lloyd's* equity had attached. If available in any way, it must, then, be, as a release of the right action. If it was a release, the *Bulls*, being strangers to it, could not take advantage of it.

The offer to convey, made by the *Bulls*, in November, 1800, was long after the date of the petition. Besides, they could not convey the same land, which they had agreed to convey; for they had not drawn. Nor does it appear, that they had any title. The offer to convey, was, therefore, a day too soon.

BY THE COURT, HILLHOUSE, *Ast.* dissenting,

The judgment was affirmed.

### Griswold v. Brown.

In the Court below,

FRIEND GRISWOLD, Administrator of *Nathaniel Griswold*, deceased, *Plaintiff*; PETER BROWN and PHILANDER MOORE, *Defendants*.

Action of trespass, for entering upon the lands, and burning the mills of the intestate, in his life-time, survives to the administrator.

**N**ATHANIEL GRISWOLD brought an action of trespass, against *Brown* and *Moore*, for entering the plaintiff's close, and burning his mills. This suit was prosecuted to final judgment, before the Superior Court, and a verdict obtained against both the defendants. *Brown* and *Moore* then brought a petition for a new trial, during the pendency of which, the defendant therein, and plaintiff in the original action, died; and a citation issued to *Friend Griswold*, his administrator, to appear and defend. The administrator appeared, and pleaded

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in abatement, that the action, in which a new trial is prayed for, is an action of trespass; that if a new trial should be granted, it must be prosecuted by the administrator; that the administrator could not prosecute such action; that, therefore, no new trial could be granted, and the petition ought to be dismissed. The Court adjudged the plea insufficient; a hearing was had on the merits; and a new trial granted. On the second trial, the defendants pleaded, severally, not guilty; and a verdict was found, and judgment rendered, against *Moore*, and in favour of *Brown*.

The administrator brought a writ of error, and assigned for error,

1. That the Superior Court proceeded to hear the petition, and to grant a new trial, after the death of the plaintiff in the original action.

2. That said Court proceeded to the second trial, committed the case to the jury, and rendered judgment therein.

*Ingersoll* and *Edwards*, (of New-Haven) for the plaintiff in error, contended, that the petition was, by the death of *Nathaniel Griswold*, abated, and could not be revived against the administrator. The original action being for a trespass on a freehold estate, it could not be prosecuted, by the personal representative of the plaintiff, after his decease. (a)

*Goodrich*, (of Hartford) and *Dana*, for the defendants in error, contended, that it was competent for the Court

(a) Cowp. 376, *Hambly v. Trott*. 2 Bac. Abr. 429, 40. 11 W. 123. Stat. Error III.

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to proceed in the petition, after the death of *Nathaniel Griswold*, and to grant a new trial. A judgment had been obtained. It was a debt against *Brown* and *Moore*, and *assets* in the hands of the administrator. It is inequitable that the death of the intestate should render the judgment irreversible.

The original action was trespass for entering on the lands, and burning the mills. It was an action for damages; and not for title, in the life of the intestate. The right of action, therefore, belonged to the administrator. If the plaintiff had died before the trial, the action would have survived; and his administrator might have entered, and prosecuted.

The old maxim, that *actio personalis moritur cum personâ*, has not a general, much less an universal, application. (b) It has not the same application as to torts done *to*, and done *by*, the testator. (c)

The principle of the Stat. 4 *Edw.* III. s. 6. by which an action is given to executors, for goods taken out of their testator's possession, extends to cases of damage done to the realty. (d)

BY THE WHOLE COURT,

The judgment was affirmed.

(b) *Cowp.* 375, *Hambly v. Trott*.

(c) 2 *Bac. Abr.* 445. 1 *Salk.* 314, *Berwick v. Andrews*. 2 *Ld. Raym.* 971, s. c. 1 *Salk.* 12, *Williams v. Carey*. 1 *Ld. Raym.* 40, s. c. 1 *Stra.* 60, *Crossier v. Ogleby*. 1 *Salk.* 295, *King v. Aylloff*. *Esp. Dig.* 295. *Cro. Eliz.* 377, 8, *Rutland v. Rutland*. *Went. Ex.* 65. *Tol. Ex.* 395.

(d) 1 *Vent.* 176. *Lucy v. Levington*. *Id.* 30, *Justice Moreton's case*. *Cro. Eliz.* 207, *Smallwood v. Coventry*. *Esp. Dig.* 439.

## Spencer v. Overton.

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In the original action,

ASHBEL SPENCER, one of the Select Men of the Town of New-Hartford, and the rest of the inhabitants, Plaintiffs ; SETH OVERTON and JOSEPH BLAGUE, Jun. Select Men of the Town of Chatham, and the rest of the inhabitants, Defendants.

ACTION of *assumpsit*.

Plaintiff declares in *assumpsit*, against a Town, for maintenance of one of its paupers, and omits to aver notice ; this defect in the declaration is cured by verdict.

The declaration stated, that one *Eli Fox*, an inhabitant of Chatham, broke his leg, at New-Hartford, and being poor, and unable to support himself, was cast, with his family, upon the Town of New-Hartford for support ; and that the select men disbursed \$50 out of the Town-treasury for taking care of him ; and concluded in the common form of indebtedness and *assumpsit*, without alleging, that notice of the plaintiffs' demand had been given to the defendants.

On the trial of this case, in the County Court, on the general issue, the plaintiffs offered in evidence a letter written by *Overton*, for himself and the rest of the select men of Chatham, acknowledging that *Fox* was a pauper of that Town, to the admission of which the defendants objected, on the ground of its being improper and irrelevant testimony to support the declaration. The objection was overruled, the letter read, and a bill of exceptions filed.

The Court found for the plaintiffs, and rendered judgment accordingly. On a writ of error, brought by the defendants to the Superior Court, that judgment was re-

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versed. The plaintiffs in the original action then brought a writ of error to this Court, praying for a reversal of the judgment of the Superior Court.

*Allen and Gould*, for the plaintiffs in error, contended, that the letter was proper evidence to shew, that the Town of Chatham had notice ; and if, therefore, on that declaration, notice might have been given in evidence, the testimony was proper. They then contended, that the defendants must be considered as waiving all exceptions to the declaration, after verdict ; or, that the defect alleged was cured by verdict. (a)

*Smith*, (of Woodbury) and *Benedict*, for the defendants in error, contended, that a verdict will not cure a declaration, where the gist of the action, or any essential fact, is omitted ; and that no fact can be presumed to have been proved at the trial, except those alleged, or such as are necessarily concomitant with those alleged. (b)

The judgment of the Superior Court was reversed.

BY THE COURT. The letter was evidence proper to be exhibited in proof, that the plaintiffs had given notice of their claim to one of the select men of the Town of Chatham. The principal question on the record is, whether the declaration of the plaintiffs is sufficient in law ? And the objection is, that they have omitted to allege notice of their claim. In the present case, the

(a) *Kir.* 140, *Church v. Norwich.* 1 *Salk.* 9, *Butler v. Cornwall.* 3 *Wils.* 380, *Freeland v. Hunt.* 4 *Bur.* 2018, *Frederick v. Lookup.* 1 *Mod.* 169, *Anonymous.* 2 *Bur.* 899, *Collins v. Gibbs.* 2 *Show.* 245, *Hitchin v. Stephens.* *Cro. Eliz.* 276, *Foxe v. Goodson.*

(b) 2 *Salk.* 662, *Buxenden v. Sharp.* *Doug.* 679, [654] *Rushion v. Aspinall.* 1 *Term Rep.* 141, *Spieres v. Parker.* 1 *Rout* 292, *Hitchcock v. Page.*



plaintiffs have alleged, with legal precision, the facts, which were material to their relief; and the averment of notice was not essential to the sufficiency of their declaration. Were it otherwise, the defect of such notice would be cured by verdict. The rule of law is, that a verdict will not cure a defective title, but will cure a good title defectively alleged. If, on examination of the record, the title claimed appeared to be defective, no title can be construed to exist; for the construction must be in conformity to, and in corroboration of, the record. A good title may, however, be intended, presumed, or inferred,—or, in other words, be found apparent upon a record,—from a view or comparison of it, in all its parts. A decision, that such proof has been made, as the law requires should be made, is often warranted, on an application of the rules of construction to a record. As relative to verdicts, it is the duty of courts to examine, whether that which the plaintiff ought to have made to appear, and has defectively shewn, on one part of the proceedings, is made to appear legally, and in a proper manner, in another part of the proceedings. In such case, the record, viewed, and legally construed, in all its parts, shews that sufficient is made to appear to evince, that the title of the plaintiff is *a good one*, and ought to be supported; though the same may be inaptly, or defectively, set forth in his declaration. The allegation, that notice was given, when compared with the other allegations, in the declaration, appears to be of minor importance. If the verdict be admitted to be true, the proof of such notice must be inferred; and such inference, or intendment, can be legally made from the record under consideration. Such has been the course of decisions; and the case of *Rushton v. Aspinall* has narrowed the rule, and is, in this respect, a departure from the principles of

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the common law, as adopted, and heretofore applied, in this State.

To this opinion of the Court, DAGGETT and EDMOND, *Justs.* dissented. (c) They said, that however the

(c) Having met with a manuscript essay on the question agitated in the foregoing case, written by a gentleman in the first rank of the profession, and for several years a member of this Court, I applied to him for permission to present it to the public. Having obtained that permission, I am happy to avail myself of it, in this place.

AFTER verdict of a jury, upon the general issue, judgment may be arrested, in many cases, for insufficiency of the declaration; but all defects, which are bad on demurrer, are not causes for the arrest of judgment; because many defects are cured by verdict of a jury.

1. All immaterial facts omitted, and all informality in the allegations, such as duplicity, for instance, are cured by verdict, not so much because they are supposed to be supplied by proof, as because it would be unreasonable to suffer a party to avail himself of such defects, after putting a defendant to the expences of a trial to the jury; and, perhaps, it is more correct to say, that the defendant waives all formal exceptions, by pleading to issue.

2. Where material facts are stated too generally, imperfectly, or with such ambiguity, that the declaration would be bad on demurrer, these defects are cured by verdict.

3. Where material facts are entirely omitted, if they are necessary concomitants of any material facts alleged in the declaration, so that in finding the facts alleged, the jury must necessarily have found the facts omitted, the defect is cured by the verdict.

But the total omission of any material fact, which is in no way connected with any fact alleged, is not aided by verdict.

The reason, why any material omission is cured by verdict, is, that the fact so omitted is supposed to have been proved to the jury. Then it follows, that when there is an omission of a fact, which could not regularly be proved to the jury, there is no room to presume they have found proof of it; and, of course, such defect is not cured.

question might be, on a general declaration of *indebitatus assumpsit*, yet here the plaintiffs had stated their case

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It is obvious that where facts are too generally, or imperfectly stated; yet if they are so stated as to apprize the party of what he has to defend against, and he sees fit to plead the general issue, these facts may be proved.

So again, in many cases, facts entirely omitted are so connected with facts alleged, that the facts alleged cannot be proved, without proving those omitted.

But where material facts are entirely omitted, and are in no way connected with facts alleged, the opposite party has no opportunity to defend against them, and they could not be proved on trial. For instance, in *assumpsit*, when notice to the defendant is necessary to be stated, if notice is stated, but the time and place, when and where given is omitted; as notice could not be proved without proving the time and place, these are presumed to be proved to the jury: but let the fact of notice be omitted, and it could not regularly be proved, and, of course, there is no room for presumption.

So again, for the same reason, if the consideration for an express promise is omitted, it is not cured; and so it is, in every case, where a fact is entirely omitted, which makes a part of the gist of the action; and I think all the cases (a) on the subject will come within some of the rules and distinctions mentioned above.

Another substantial reason, why material facts not stated cannot be presumed to have been proved, is, that the jury are bound to find a verdict, when they find all the facts stated in the declaration to be true; and the plaintiff is not obliged to prove any more than he has stated, in order to entitle him to a verdict, if, indeed, he might be permitted to.

The idea, then, which has been entertained by some respectable lawyers, that after verdict the court will presume facts, not stated, necessary to support legal inferences, appears to be unfounded.

That the facts omitted are connected with legal inferences drawn by the jury, is not sufficient; but, in order that they may be presumed to be found, they must be connected with facts found by them.

(a) Doug. 683. 1 Salk. 364. 2 Salk. 660. 1 T. R. 141.

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especially ; and then it is necessary, that every essential requisite to a recovery, appear on the declaration. No notice is alleged, nor any fact, which is necessarily concomitant with it. The case is, therefore, within the rules laid down in *Rushton v. Aspinall*, and *Spieres v. Parker*, which ought to be adhered to.

# *The Supreme Court of Errors,*

HOLDEN AT HARTFORD, IN JUNE, 1804,

CONSISTED OF

HIS EXCELLENCY JONATHAN TRUMBULL,  
GOVERNOR,

HIS HONOUR JOHN TREADWELL, LIEUTENANT-  
GOVERNOR,

HONOURABLE OLIVER ELLSWORTH,

HONOURABLE WILLIAM HILLHOUSE,

HONOURABLE JOHN CHESTER,

HONOURABLE ROGER NEWBERRY,

HONOURABLE AARON AUSTIN,

HONOURABLE JONATHAN BRACE,

HONOURABLE JOHN ALLEN,

HONOURABLE CHAUNCEY GOODRICH,

HONOURABLE WILLIAM EDMOND, and

HONOURABLE ELIZUR GOODRICH,

ASSISTANTS.

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Smith v. Raymond.

1804.

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In the Court below,

PHINEAS SMITH, *Plaintiff*; TIMOTHY RAYMOND, *Defendant*.

THE plaintiff brought an action of trespass, alleging that the defendant had entered upon his land, and cut down his timber trees thereon standing; to which title was pleaded, and the cause removed agreeably to the statute. (a)

A verdict must contain all the material facts put in issue.

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In the Superior Court, the cause was tried on the following pleadings :

Plea—" That long before the date and impetration of  
 " the plaintiff's writ, one *Luke Raymond* of Stamford,  
 " in said County, was well seized and possessed, in his  
 " own right, in fee, of the land and premises, on which  
 " the said trees were standing and growing ; and the  
 " said *Luke Raymond*, for more than thirty eight years  
 " before, was, and ever since hath continued, seized  
 " and possessed, in his own right, in fee, of the land,  
 " on which said trees were growing as aforesaid ; and the  
 " said *Luke Raymond* being so seized thereof, he the de-  
 " fendant, at the special instance and request of the said  
 " *Luke Raymond*, and as a servant to him, did on or  
 " about the 1st day of March, 1797, enter in and upon the  
 " north side of said described piece of land, and did then  
 " and there cut about four trees, then and there standing  
 " and growing on said land of the said *Luke Raymond*, as  
 " well he might do ; all which is the same cutting," &c.

Replication—" That said land, at the time of cutting  
 " said trees, and at the time the defendant was so re-  
 " quested to cut the same, and long before, and ever  
 " since, did of right belong to the plaintiff, as his own  
 " estate, in fee, exclusively of all others ; *without that*,  
 " that said *Luke Raymond* was, in any way or manner,  
 " seized or possessed of the land, on which said trees  
 " were standing and growing ; and *without that*, that  
 " said *Luke Raymond* was ever, at any time, seized or  
 " possessed, in his own right, or in right of any other  
 " person or persons, of the land, on which said trees  
 " were growing as aforesaid, either *at, before, or after*,  
 " the date and impetration of the plaintiff's writ ; and  
 " *without that*, that the defendant might well, or by any

"right, enter on said land, or cut said trees, at the special instance and request of, or as servant to, the said *Luke Raymond*."

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Issue was joined to the jury, who returned the following verdict: "In this case, the jury find, that long before the date and impetration of the plaintiff's writ, one *Luke Raymond* of Stamford, in said County, was well seized and possessed, in his own right, in fee, of the land and premises, in the plaintiff's declaration mentioned, on which the said trees were standing and growing; and, therefore, find for the defendant his cost."

The plaintiff moved in arrest of judgment, that the verdict contained no material fact put in issue by the pleadings. The Court adjudged this motion insufficient, and sustained the verdict.

*R. M. Sherman*, for the plaintiff.

*Smith*, (of Woodbury) and *Daggett*, for the defendant, contended, that the traverse, offered by the plaintiff, was in the alternative,—"*either at, before, or after,*"—and that the verdict had answered one of the alternatives.

BY THE COURT. The question on the pleadings, as closed, is a question of title. The plea of the defendant is not so formal as it might have been; but, so far as respects title, is substantially good, and if true, sufficient to save the defendant from the plaintiff's demand. The replication of the plaintiff is, also, somewhat informal, but substantially good, as it negates and puts in issue every part of the defendant's plea material or essen-

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tial to the decision of the question of title, and of the plaintiff's right to recover. By the verdict of the jury nothing more is found, than, "That long before the date "and impetration of the plaintiff's writ, one *Luke Raymond* of Stamford, in said County, was well seized "and possessed in his own right, in fee, of the land and "premises in the plaintiff's declaration mentioned, "on which the said trees were standing and growing."

But whether, at the time of the licence given to the defendant, or at the time of cutting the trees complained of, or at the date and impetration of the plaintiff's writ, the said *Luke Raymond* was seized and possessed of the premises, (which material facts were put in issue by the pleadings) does not appear from the verdict; nor are they, with any certainty, to be inferred therefrom. The verdict of the jury is, therefore, defective, in that it does not find the material facts put in issue, and is wholly undecisive as to the question of title, which the defendant, by his plea, took upon himself to establish. The verdict of the jury, therefore, did not lay a foundation sufficient to warrant the judgment of the Superior Court, in favour of the defendant; and the plaintiff's motion in arrest ought to have been adjudged sufficient; and for this, the judgment of said Superior Court is reversed.



## Pinto v. Atwater.

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In the Court below,

TIMOTHY ATWATER, EBENEZER PECK, JOHN MILES,  
3d, STEPHEN ALLING, and DANIEL TRUMAN, *Plaintiffs*;  
WILLIAM PINTO, *Defendant*.

**T**HIS was an action of book debt.

The general issue being pleaded, and closed to the jury, a special verdict was found, containing the following facts: The plaintiffs being joint owners of the brig *James*, lying in the port of New-Haven, ready for sea, and bound for the Island of Trinidad, the defendant, on the 26th of November, 1799, applied to them for passage for himself and family, and for freight of two horses and one barrel of apples, from New-Haven to Trinidad. The plaintiffs agreed to take the passengers and freight, and transport them accordingly. The defendant for the passage of himself and family agreed to pay \$ 100, for the freight of the horses \$ 70 each, and for the freight of the apples \$ 3. The plaintiffs, at the request of the defendant, furnished the layings-in for the horses, of the value of \$ 20, which the defendant, by the usage in such cases, was to pay to the plaintiffs. The passengers and freight being taken on board, the brig immediately proceeded on her voyage, in the direct course from New-Haven to Trinidad. On the 18th day after her departure, and being within 48 hours sail of Trinidad, having performed nine tenth parts of her voyage, she was, without any fault on the part of the master, mate, mariners, or owners, captured by a French privateer, and after the master, mate and crew were forcibly taken out, and a prize master and crew put on board, she was ordered for Gua-

Where property is transported on freight, which is captured on the voyage, and afterwards recaptured, and restored upon payment of salvage, freight is to be paid in proportion to the voyage performed, and the property saved, after deducting the salvage.

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daloupe, then subject to the French Republic. Three days after capture, she was retaken off Guadaloupe, by an English sloop of war, and on the 3d day after recapture, carried into Martinico, then in the possession, and under the government, of the Kingdom of Great-Britain. She was there holden, by the recaptors, as a lawful prize, subject, however, to be ransomed, on the payment of salvage. On her being libelled, by the recaptors, in the Court of Admiralty, for Martinico, the defendant applied to the agent of the recaptors, and made a compromise with him for the salvage due on account of said horses and apples, amounting to one third of their value. This sum the defendant paid to the agent, and received the horses and apples in good order, without making any objection. The horses he immediately sold for \$ 210 per head, which was a good price for the same, before the plaintiffs had a reasonable time to proceed on the voyage to Trinidad. For the salvage, which the defendant paid, the insurers, who had insured the horses, paid him \$ 98. The plaintiffs filed a claim in the Court of Admiralty to have the brig and the residue of the cargo restored to them, upon payment of salvage; and thereupon such proceedings were had, that the vessel and cargo were sold for the benefit of the recaptors and claimants. One third part of the proceeds thereof was paid to the former for salvage, and the residue to the latter. The master and officers of the brig, who had been taken out by the French, arrived at Martinico, within 21 days from the time of the capture, and while the defendant was there, but not until 14 days after the arrival of the brig. The defendant, however, did not request the master, or any other person for the plaintiffs, to proceed with him and his family to Trinidad. The necessary expences of the defendant, for himself and family, during his detention in Martinico,

amounted to \$ 148. On the 22d day after the arrival of the brig in Martinico, the defendant procured for himself and family a passage to Trinidad, on board an English armed schooner, for which passage he contracted to pay \$ 100. This schooner was, on the passage, captured by a French privateer, and, with the defendant and his family, carried into the Island of Margarett. The captain, on the capture of his vessel, relinquished all claim upon the defendant for passage money. From Margarett, the defendant, at the expence of \$ 40, procured himself and family to be transported to Trinidad, where they arrived in 41 days after said brig arrived at Martinico. The usual passage from New-Haven to Trinidad is performed in 20 days. The trade winds generally prevail between the latitudes of Martinico and Trinidad, and from that cause passages are rendered difficult from the former Island to the latter, being performed sometimes in 4, and sometimes in not less than 28 days.

This action was brought to recover \$ 100 for the passage of the defendant and his family; \$ 140 for the freight, and \$ 20 for the layings-in, of the horses; and \$ 3 for the freight of the apples; all which were exhibited in the plaintiffs' account on trial.

Upon these facts, the Superior Court adjudged, that the plaintiffs were entitled to recover the sum of \$ 20 for the layings-in, and such part of the sum of \$ 140 for the freight of the horses as is in proportion to that part of the voyage performed before the capture, *i. e.* nine tenths of the whole; but that the plaintiffs were not entitled to recover any part of said sum of \$ 100 for the passage of the defendant, and his family, nor any part of said sum of \$ 3 for the freight of said barrel of apples.

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The defendant brought a writ of error, stating that the plaintiffs were entitled to recover only the sum of \$20 for the layings-in.

*Edwards*, (of New-Haven) for the plaintiff in error, admitted that *Pinto* must pay for the layings-in, but contended, that, under the circumstances,—after a capture, recapture, and condemnation,—nothing else could be recovered.

The Superior Court decided, that the plaintiffs below could recover nothing for the passage of the family, or for freight of the apples, but might recover nine tenths of the freight for the horses, as nine parts out of ten of the voyage were found to be performed.

But, it is contended, that they cannot recover any part.

This action of book debt is founded upon a *precise* contract, which is precisely found by the jury, upon application by *Pinto*, to transport his family and property to Trinidad, for a specific price.

The object was to get to Trinidad ;—no other place was in view.

The jury have also found what the book account is. The claim is founded on the contract. Can they, then, recover upon the ground of a special contract, which has never been fulfilled by them ?

In all cases, where the plaintiff claims a sum of money, when a prior act of his is the consideration upon which payment is to be made, he must show performance upon his part ; nor is it sufficient for him to show, that he was

hindered by the act of God ; or that he did all he could do. Thus, if a ship sails from New-Haven, and arrives within an hour's sail of good mooring, and then upsets, and the cargo is lost, without any fault, freight never can be recovered by the owner.—This will be recognized by all, in case of a charter-party. (a)

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It may be said, that the action, in the case cited, is founded upon a covenant ; but that can make no difference. The only question is, whether the party claiming from the contract, has complied with the conditions of it. Lord KENYON, in the case of *Cook v. Jennings*, (b) intimates, that there is no difference whether the contract is by deed, or otherwise, if the terms of it are precisely defined.

The doctrine contended for, by the plaintiff in error, is founded upon good sense, and supported by authorities. (c) One agrees to transport goods to New-York, and fails to do it ; he can, therefore, have no claim for doing it.

But it has been contended, and adjudged, that the plaintiff may recover a part of the freight proportional.

*Molloy*, who is a great authority in mercantile questions, says, (d) "freight is due for so much as the ship has earned." Lord MANSFIELD, in the case of *Luke v. Lyde*, (e) agrees that freight is due only *pro rata itinervis*, though he erred in the application of the rule.

If the Court are of opinion, that the action of book

(a) 1 Brownlow 21, *Bright v. Gosper*.

(b) 7 Term Rep. 381.

(d) *Molloy* 371.

(c) 1 Balst. 127.

(e) 2 Burr. 332.

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debt is an equitable action, and under a precise contract, an apportionment can be made ; yet we deny, that any part of the freight is due.

At the time this vessel sailed, we were at war with France. She was taken by the French ; was in their possession three days ; was recaptured by an English vessel ; was condemned, and sold. Was not, then, the voyage entirely lost, and at an end, as it respects the owners ? Could they not have then abandoned to the underwriters ? Was not the property then in the English ?

Suppose *Pinto*, instead of ransoming the horses, (which implies that they might be lawfully holden) had not done it ; could he ever have been called upon for freight ? If the vessel had been utterly lost at sea, he could not have had a better right to abandon, than he now had. (*f*) As to *Pinto*, the law considered it as a total loss, and he could recover against the underwriters.

It is absurd to say, that he should be called upon to pay *pro ratâ*, if the goods are ransomed, and if they are not ransomed, that he is not liable.

Suppose a vessel upsets, and the owners, hearing of it, abandon ; she afterwards rights, and is brought home, and delivered to the underwriters ; could the owners of the vessel call upon the owner of the goods to pay *pro ratâ itineris* ?

But is that rule, as applied by the Court, to be justified at all?—As the ship had performed nine tenths of the voyage ; therefore, you shall pay at the rate of nine

tenths ; and this is supposed to be supported by the case of *Luke v. Lyde*. In that case, Lord MANSFIELD thinks it reasonable, that the part lost should be considered. But here, the Court have not allowed that part, which was lost. That case, therefore, does not support this decision.

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When a general rule is not correctly applied, we may reject the application and resort to the rule ; otherwise, we surrender our reason to the judgments of Westminster-Hall.

All agree, that a recovery must be founded upon the justice and equity of the case. Look, then, at the facts in that case, and see, whether there is any justice or equity in the application of this principle. Suppose that a vessel having taken from New-Haven freight to Trinidad, has got into the chops of the harbour, and is then blown into Spain ; the goods are safe, but the ship injured, and the master gives up the goods, and will not carry them further ; the owner receives them, at more than twice the distance from their port of destination, that they were at, when he delivered them ; the goods there are of no value, and are sent back to New-Haven ; according to the decision, he must pay ninety-nine hundredths of the freight. Is there any equity in this ? Has any good been done to the freighter ? You were injured by the weather ;—but had the vessel sunk, you would have had the same argument.

The application of the general rule in *Lutwidge v. Grey*, (*g*) is correct. You shall be paid according to what you have earned, *i. e.* according to what you have

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done for the benefit of the freighter. If, therefore, a vessel sails from Newfoundland to New-York with grindstones, and, after reaching Sandy Hook, is driven back to St. Johns, and the cargo is to be sold at the same place from whence it started ; as no good has been done the owner, he cannot, upon principle, be liable.

But, it will be contended, that the plaintiffs below had not a reasonable time to carry the goods to Trinidad. But that is a question of law arising upon the facts stated in the special verdict. If the captain had offered to carry them to Trinidad, *Pinto* could have said, " the property is libelled, I have not the possession of it." But it appears, that the captain was not at Martinico, under seventeen days after the vessel.

It may be said, the property was insured. But if it had been entirely lost, the owners of the vessel could derive no benefit from the insurance.

It may be asked, had the vessel been carried into Trinidad, could not a recovery have been had? No ; because a loss happened before it arrived there.

*Smith*, (of New-Haven) and *Denison*, for the defendants in error.

The claim of the defendants in error is, that upon the facts found they are entitled to freight on the horses, *pro rata itineris* ; and to \$ 20 for stores furnished for the horses. It is conceded by the plaintiff in error, that we must recover the \$ 20.

It will be noticed, that the action is not brought upon any *special agreement* between the parties. It is an ac-



tion of *book debt*, wherein we claim a *quantum meruit* for the freight of the horses. This circumstance, it is conceived, becomes material, from the consideration, that if we ground our claim upon a special covenant, it becomes essential to prove a fulfilment, on our part.

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The objections, which are made to the payment of freight, will be found to be comprehended in this general one, that the horses have not been transported to Trinidad, as was agreed, at the time when they were received on board, in New-Haven. Although it was agreed, that the horses should be transported to Trinidad; yet there was no condition expressed in this agreement, that *Pinto* should not be holden for a rateable freight, if the property should be delivered at any other port. If there be no specific agreement to controul the operation of law, the general rule is, that freight must be paid wherever the goods are *delivered and accepted*, be that where it may. (*h*) It is always, however, at any port, other than the port of destination, at the option of the *master* whether he will *deliver*, and at the option of the *merchant* whether he will *accept*. If there be no faults in the master, mariners, or owners of the vessel, and the property be not abandoned, but accepted by the freighter, freight must be paid, either *in toto*, or *pro ratá*. (*i*) Shipwreck, or capture, does not dissolve the contract between the parties, if all, or any part of the goods be saved. In such a case, the master of the vessel has his election, whether to procure another vessel, and proceed on the voyage, and deliver the property at the port of destination, and obtain *whole freight*, or to leave the property at the disposal of the freighter: and the freighter has his election,

(*h*) *Abbott on Shipping* 243, 4.

(*i*) See *Abbott on Shipping* from 234 to 243, and *Luke v. Lyde*, *Burr* 389.

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whether to accept the property, and pay a rateable freight, or to abandon it to the owner or master of the vessel. The *acceptance* of the property virtually amounts to an engagement to pay; the abandonment of it amounts to a refusal. The better opinion doubtless is, that in case of the arrival of property at the original port of destination, the freighter has no right to abandon. But, in case of shipwreck, or capture, before arrival, he doubtless has a right to abandon, in lieu of the payment of freight. Under such circumstances, the shipper has his election to make. If he accepts the property, he must pay a rateable freight; if he abandons, the master, or owner must take the goods as payment for the freight. By this rule, it will be readily seen, that in case of shipwreck or capture, the owner of property can never be compelled both to lose his goods, and to pay the freight. In the special verdict it is found, that *Pinto* took possession of the horses without making any objection, and without demanding, that they should be carried to Trinidad, and sold them for \$ 210 a head.

Having thus accepted the property, and appropriated it to his own use, he waived the right of abandoning, and took upon himself the payment of freight, in lieu of charging it solely upon the horses.

The goods can always be holden as a pledge for the payment of freight; and the master may legally refuse to deliver them up, until freight be paid. If the property be taken from the master of the vessel, by the shipper, the lien for freight upon the goods is lost, and the responsibility for payment thereof transferred to the person, who receives the property. For, it certainly would be a very singular doctrine, that we may retain the property of the shipper, until freight be paid; and

yet have no right of action against him, when he has taken the property out of our custody.

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Further, it is found in the special verdict, that *Pinto* sold the horses before the master of the vessel had a reasonable time to proceed on the voyage to Trinidad. It will not be denied, that if, after capture, or shipwreck, or any accident, whereby the goods are carried to a port other than the port of destination, the master should *offer* to transport the goods to the port of destination, he will be entitled to whole freight, whether his offer be accepted or not. (*k*) Now, a reasonable time ought to be allowed the master to make this *offer*. If it be necessary to repair, or procure another vessel, in consequence of the disability of his own, some time must necessarily be allowed to perform this business. But *Pinto*, by not waiting a *reasonable time* before he sold the horses, has completely put it out of our power to have transported them to Trinidad, if we had been disposed so to have done. Shall *Pinto*, by this act of his own, in which we were not consulted, bar us of the claim, which we should otherwise have had against him, for the payment of freight? Upon this principle, in order to avoid the payment of freight, when a vessel is delayed by shipwreck, or capture, the freighter has only to sell the property, without consulting the master of the vessel, and perhaps, in this way, reap all the profit which he would have received, if the property had been transported, in safety, to the original port of destination.

A partial performance of a contract, particularly when accepted as such, always entitles the party performing to

(*k*) *Lutwidge v. Grey*, reported in *Abbott on Shipping* 249. *Lyle v. Lyle*, 2 Burr 882.

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a compensation proportioned to the services rendered. In such a case, however, the action should not be brought upon the special agreement. The action should be, as this action substantially is, an action of *assumpsit* for services rendered. On this idea, the case of *Cook v. Jennings* (l) may be reconciled with *Luke v. Lyde* before mentioned. The first mentioned order was brought on the special covenants, and decided on that ground; the other was an action of *assumpsit* generally, and not an action founded on the original contract for the conveyance of goods. (m) It will be seen by inspecting the case of *Cook v. Jennings*, and the reasons of the Court, that they considered the law, as laid down by Lord MANSFIELD, in *Luke v. Lyde*, to be correct. A very familiar instance will illustrate the distinction referred to. If a carpenter enter into a contract to build a house, of a certain shape and dimension, but builds one wholly different from the contract; if the person, for whom the house be built, take possession thereof, the carpenter can compel him to pay a *quantum meruit*; but could not sustain an action on the contract, for this very obvious reason, that he has not performed the stipulations on his part.

With regard to the personal expences of the plaintiff in error, and his family, it is sufficient to remark, that they have nothing to do with the freight, are wholly distinct therefrom, and cannot be taken into consideration, either to increase or diminish the proportion of freight, which ought to be paid. (n)

BY THE COURT. The question is, whether the plaintiffs below shall be entitled to freight, according to the

(l) 7 Term Rep. 381.

(m) *Abbott on Shipping* 258.

(n) See *Abbott on Shipping*, Chap 7, *passim*.

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voyage performed, without any regard to the salvage paid ; or whether the salvage shall diminish the freight in such manner, that the plaintiffs shall receive no more than a rateable freight for the property actually saved to the defendant. By the judgment of the Superior Court, the freight has been allowed according to the voyage performed, without reference to the salvage paid ; whereas, in the opinion of this Court, a rateable freight only should have been allowed, in proportion to the property actually saved to the defendant.

By the laws of nations, salvage is payable to the recaptors of a vessel, on vessel and cargo. In this instance, the recaptors were entitled to salvage ; and the compromise entered into, by the defendant, with the agent of the recaptors, was necessary, on his part, for the security of his property, and beneficial to all parties concerned, by saving the cost of admiralty process, and a sale of the property. The salvage is a loss, to which, by law, vessel, freight, and cargo are liable to contribute ; and, therefore, diminishes freight, in such manner, that the plaintiffs should recover no more than a rateable proportion of the property actually saved to the defendant.

For these reasons, the judgment of the Superior Court was reversed. The defendants in error then made a written motion, that this Court would enter judgment for such sum, as they were, by law, entitled to recover. This motion was denied, and the cause remanded to the Superior Court, that such further proceedings might be had therein, as to law doth appertain.

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## Hobby v. Mead.

In the Court below,

RICHARD MEAD, sole administrator on the estate of Isaac Holmes, Jun. deceased, *Plaintiff*; RICHARD HOBBY, *Defendant*.

A declaration may be amended after it has been adjudged insufficient.

**T**HIS was an action of debt, on a judgment recovered in the year 1790, by *Amos Mead*, then sole administrator on the estate of *Isaac Holmes, jun.* against the defendant, stating, that the defendant had been taken by an execution upon that judgment, and committed to gaol; that he had taken the poor prisoner's oath, and was discharged from gaol; that he had since become possessed of a large estate, more than sufficient to pay his debts; and that said judgment yet remains unpaid, and unsatisfied.

To this declaration there was a demurrer, in the Superior Court, and, in August term, 1803, the declaration was adjudged insufficient; and *afterwards*, the plaintiff moved, and obtained liberty, to amend his declaration, upon payment of costs.

The plaintiff then amended his declaration by stating, that *Amos Mead*, in the year 1801, became *non compos mentis*, and had so continued; and, on that account, was, by the Court of Probate, removed from the office of administrator, and the plaintiff was appointed; of which appointment the plaintiff accepted, and executed bonds according to law. After the declaration was thus amended, the defendant, in January term, 1804, suffered a default; and now brings this writ of error, and assigns for cause,—that the Superior Court permit-

ted said declaration to be amended, and then rendered judgment for the plaintiff, after they had once rendered judgment for the defendant therein.

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*Smith*, (of New-Haven) for the plaintiff in error.

By the statute authorizing amendments, (a) the Court may permit amendments, in civil cases, *pending* before them. Was this suit "pending" at the time of the amendment?

After judgment there was an end of the case; the parties were out of Court; the cause was decided upon a question, which went to a total extinction of the right of action. The defendant, having obtained a judgment, was not bound to appear; and there is nothing upon the record to shew, that he did appear, after that judgment.

Suppose, that as soon as the demurrer was decided, the plaintiff had commenced a new suit; could the defendant have pleaded in abatement, that this suit was pending? If so, in every case, where a declaration is insufficient, the plaintiff cannot bring a new action, but must amend the former.

*Baldwin*, and *R. M. Sherman*, for the defendant in error.

Leave was given to amend, at the same term, that judgment was rendered; it is, therefore, to be presumed, that licence was given as soon as possible after judgment; perhaps *instantly*.

It is precisely analogous to any other motion after a

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verdict of the jury. Judgment goes, of course ; but it may be stayed, by a motion in arrest, or a motion for a new trial ; and the Court, in those cases, as well as in this, have nothing to do, but to tax the cost, when the motion is made.

So, if a case is defaulted, upon motion, a hearing in damages may be obtained.

In those cases, the suits may be said to be terminated, as well as in this. The test, therefore, that a new suit might have been instituted, proves too much.

The decisions of our Courts, before the act of 1794, were liberal upon the subject of amendments.—Where an issue was closed to the Court, and tried by the jury, an amendment was allowed after verdict. (*b*)

Our statute proceeds upon the same liberal principles. It is agreed, that the amendment must be made while the case is pending.

After a judgment, on a plea of abatement, the plaintiff may amend. The action is then as much out of Court, as if judgment was given upon demurrer ; and is exactly in the same situation.

The Court had merely given an opinion, that the declaration was insufficient ; and before the judgment for costs was rendered, a motion to amend was made, and allowed. In a subsequent judgment, in January, 1804, it is mentioned, that the Court rendered judgment for costs ; but these costs were not taxed ; and before the record proceeds any further, it appears, that the amendment was



allowed. The suit might, therefore, be said to be pending. Such a construction accords with the intention of the legislature ; and no case shows the equity of such construction more than the present, as without it, the benefit of the attachment would be wholly lost.

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But, if the Court erred in suffering the amendment, yet if they likewise erred in finding the declaration insufficient, the final judgment was right. The only exception to the declaration, before amendment, was, that it did not appear what had become of the former administrator. But there can be no reason why the cause of removal of a former administrator, or the appointment of a new one, should be stated, any more than the cause of appointing an administrator should be stated, where there had been but one. No benefit results to the defendant more in one case, than in the other. When a jury have found a verdict for the plaintiff, if, from the whole record, it appears to the Court, that judgment ought to be for the defendant, they will render judgment accordingly. So, in this case, if the permission to amend was wrong, yet if the declaration before was good, a reversal of this judgment, will only force us to bring a writ of error upon the other.

*Smith*, (of Woodbury) in reply.

A variety of statutes in England allow amendments, in mere matters of form. Our late statute, allowing amendments in matters of substance, is peculiar to Connecticut, and derogating from the common law. It is not, therefore, to be extended. It is said, on the other side, that attachments may be lost, if such amendments are not allowed. But bondsmen, receipts-men, and creditors, viewing the declaration insufficient, may have

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governed themselves accordingly ; and shall not they be protected, by a good judgment?

The statute relating to abatements, has nothing to do with this case. *That* speaks of an amendment, after judgment ; but such are not the words of this statute. Neither can this defect be rectified as a mistake ; for here has been no mistake.

After a verdict, by a motion in arrest, a case may be pending ; but in such case there could not be a default against a defendant.

The Superior Court have decided, that the plaintiff cannot withdraw a suit, after a verdict is delivered to the clerk ; but cannot the plaintiff withdraw a case, which is pending?

But, it is said, the costs were not taxed ; but the Court did, in August, adjudge the declaration to be insufficient. Is it necessary, that the costs should be taxed, to make up the judgment? If so, a defendant, who has judgment upon a point of form, may forbear to exhibit his bill of costs, and the case will be always pending, and no new suit can be brought.

Costs must have followed, of course, if they had not been made part of the judgment. They may be taxed, by a single judge, in vacation.

In this case, it is no where found, that costs were paid, which was the condition of the amendment.

But, it is said, there are two errors ; and, therefore, there are none ; and, it is asked, is not substantial jus-

tice done on the amendment? If this is allowed, the Court may suffer an amendment, at any time after the judgment, and without notice to the other party, and then say, that justice is done.' And the same might be said, if they refused the defendant a hearing in damages. If a writ of error had been brought upon the first judgment, the case might have been sent back, and we put to plead anew, or to have a hearing in damages.

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But the Court did right, in adjudging the declaration insufficient. The plaintiff described himself as administrator; in the declaration he has shewn a judgment in favor of another man as administrator; the defect was in the declaration, and not in the writ. If A. sued B. on a note, payable to C. he might recover, if notes were negotiable; but he must show the note declared on to be of that description. So, in this case, the administrator should have pointed out his right to claim.

The judgment upon the demurrer was final, and no further proceedings could be had; and, if it be admitted, that it was incorrect, it is contended, that one erroneous judgment cannot be set off against another.

BY THE COURT,

The judgment was affirmed.

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## Johnson v. Huntington.

In the Court below,

JEDEDIAH JOHNSON, and the rest of the inhabitants of the Town of Canterbury, *Plaintiffs*; EZRA BISHOP, and the rest of the inhabitants of the Town of Lisbon, *Defendants*.

A woman, belonging to this State, married to an inhabitant of another State, may gain a settlement, if her marriage is void.

A lunatic, needing support, may be removed to the town where she has a settlement, although she has a reversionary estate, in fee, in the town where she resides.

**T**HIS was an action on the case, brought by the Town of Canterbury, against the Town of Lisbon, for removing on or about the 1st of April, 1801, *Ruth Barber*, a pauper, who then was, and for a long time had been, unable to support herself, into the Town of Canterbury; by which they were put to expence, &c.

To this action the defendants, by their agent, *B. Huntington*, pleaded the general issue; and, in January, 1803, a special verdict was found, stating the following facts:—On the 6th of March, 1801, the select men of Lisbon removed into Canterbury *Ruth Stevens*, alias *Ruth Barber*, an insane and poor person, unable to support herself, for whose maintenance, Lisbon had expended \$10.

She was born in Lisbon, and there lived till she was about thirty years of age. On the 12th of July, 1787, she was married, by the Rev. Mr. Lee of Lisbon, to *James Barber* of Medway, in Massachusetts, and immediately removed, with *Barber*, into Canterbury, and there lived with him, as his reputed wife, two years, and eight months. They then removed into Plainfield, and there dwelt together, six months; then returned into Canterbury, and there lived together, till March, 1792; then removed into, and remained in Lisbon, one year; then returned to Canterbury, and there lived together,

three years ; then removed to Norwich, and continued there, about one year ; then returned to Lisbon, and continued there, about two years. Then said *Ruth* went into Canterbury, and soon after, *Barber* transported their household furniture into Canterbury, where it remained, when she was removed, by the select men of Lisbon.

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On the 11th of March, 1788, the select men of Canterbury caused a warning, directed to *James Barber*, and widow *Mary Stevens*, to be served upon *Barber*, directing them, and each of them, to leave the Town. *Barber* at the time of his marriage with *Ruth*, had a wife, living in Medway, in Massachusetts, to whom he was lawfully married, in 1762, and who survived until the year 1796. This marriage, however, was wholly unknown both to the plaintiffs, and defendants. *Barber* and *Ruth*, during their cohabitation, were reputed to be husband and wife.

In the year 1797, a patrimonial real estate, in fee, in the Town of Canterbury, was distributed to *Ruth*, of the value of 45*l.* 5*s.* 11 1-2*d.* When removed by the select men of Lisbon, she was not possessed of real estate, in Canterbury, of a greater value than \$60. At the same time, a reversionary interest in one undivided eleventh part of about thirty five acres of land, in Lisbon, vested in her, subject to the life estate of her mother, who is still living ; which interest was worth more than the sum expended by the Town of Lisbon, for the support of *Ruth*, previous to their removing her.

Upon these facts, the Superior Court, adjudged, that *Ruth* had gained a settlement in the Town of Canterbury, and that the defendants had a right to remove her.

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*Bacon*, for the plaintiffs in error.

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Two questions arise upon this record :

First, whether *Ruth Barber* gained a settlement in Canterbury ? And

Secondly, if she did, whether Lisbon had a right to remove her ?

1. It is found, that she was a native of Lisbon. How has she been transferred to Canterbury ? What has Lisbon done, or what has Canterbury omitted to do, to vary their respective rights ? The Town of Lisbon have, indeed, married one of their paupers to an inhabitant of Massachusetts ; but, if they are to gain by this, they are to profit by a crime.

Canterbury has given credit to a marriage, solemnized in Lisbon, under the forms of law. Can Lisbon impeach a marriage, to which the members of that corporation were privy ?

The select men of Canterbury have sufficient legal evidence, to give credit to the marriage ; for reputation and cohabitation are, to *all civil purposes*, especially in cases arising between two parishes, *conclusive evidence* that the parties are husband and wife. (a) The Court had, therefore, sufficient evidence to pronounce them such.

Suppose the select men of Canterbury had removed *Ruth* to Lisbon, and separated her from her husband ; (for they could not have removed him ;) *Barber* might

(a) *Bur. Set. Ca.* 508.

have brought an action against them, and need not have produced any evidence of marriage, but cohabitation and reputation. We could not have pleaded *ne unques ac-couple in loyal marriage*. (b) The Town, then, were in this strange dilemma : if they removed her, they were liable to *Barber* ; if they did not, they must support her. She was, then, in such circumstances, that she could not be removed ; and could, therefore, gain no settlement, any more than a person confined in gaol.

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But if Canterbury could have contested the validity of the marriage, they were no more bound to do it, than the Town of Hartford would be to examine the validity of an execution, on which a debtor is committed to gaol, lest such debtor might become an inhabitant, if it were illegal.

A settlement cannot be gained where the residence is clandestine ; or where there has been any art, or fraud. The pauper did not reside in Canterbury, in that *fair, open manner*, necessary to give a residence ; but was there under *false colours*, claiming to be the wife of *James Barber*. Suppose a pauper should forge a deed of land in Hartford ; and, on the credit of that, should live there a year, under the old statute ; would he gain a settlement, by that evidence ?

The jury have found the Towns equally ignorant of the fact of the former marriage. One innocent party cannot throw its burthens on another, equally innocent.

Under the old law, persons could not gain a settlement, without the consent of the select men, either express or implied, unless they had real estate. But the select men

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could not have assented to a thing, of which they had no knowledge. *Ruth* they knew as a feme covert, but not as a feme sole.

Although a second marriage, during the life of a former husband, or wife, is void, as it respects the parties; yet it may be very different as it respects third persons; and even a party, if innocent, may acquire some right thereby. (c) Thus, a woman marrying a second husband, living the first, and the second ignorant thereof, was treated as the servant of the second. (d) So a parol lease is void; yet it may operate as a licence. So though the contracts of an infant may be void, yet he can never treat the purchaser as a trespasser.

2. Had Lisbon a right to remove the pauper to Canterbury?

The statute for the admission of inhabitants (e) provides, that when a person becomes *unable to support himself* and family, and becomes *chargeable*, he may be removed. Such person must be *unable* to support himself. By this is doubtless meant, a pecuniary inability, and he must actually become *chargeable*; for a person may be unable to support himself, and still have relations, who save the town from charge.

Here, the jury have found, that *Ruth* had a mother, possessed of property; and that she herself had real estate in Canterbury, and Lisbon. Any payment, therefore, by the Town of Lisbon, must have been *voluntary*; and a recovery cannot be had for a voluntary payment by parish officers. (f)

(c) 2 Pow. Con. 10. Co. Litt. 526. (d) 2 Stra. 80, *Strutville v. —*.

(e) Stat. 240. Par. 4.

(f) Doug. 9, *Simpson v. Johnson*.



The statute providing for the support of insane persons, idiots, &c. (*h*) makes certain relations liable, when such insane persons, idiots, &c. have *no estate*. *Ruth* being within the description of persons pointed out in that statute, the Town was not first liable, but her relations; and her relations were not liable, while she had estate; and application should have been made to the County Court, for the disposition of that estate.

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*Dana*, and *Dwight*, for the defendants in error.

The question is, whether a ceremony, declared by a statute absolutely null and void, can have the effect of suspending the power of gaining a settlement? For there is no question that the pauper resided a *sufficient time* in Canterbury, under the statute then in force, to gain a settlement.

That a wife *de facto* has certain rights is admitted; but none of the cases go the length contended for in this. The case from *Powell* shews, that equity may, in such case, assist the parties, because the law cannot. In *Strutville's case*, (*i*) the court adopted a fiction, to give the innocent party the benefit of the services of the other. The case from *Co. Litt.* only serves to show the distinction between a void marriage, and one voidable. A prior marriage is an objection totally distinct from a case of precontract. A marriage after a precontract is recognized by the courts of law, till there has been a divorce; but a marriage, during the life of a former husband or wife, is *void*, by the common law, as well as by our statute. The case of *Allen v. Gray*, (*j*) and that from *Burrow*, only shew, that this question is not to be

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(*h*) Stat. 232.

(*i*) 2 *Str.* 80.

(*j*) *Comb.* 131.

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collaterally tried, but must be declared by the sentence of a proper tribunal ; and that a party to an illegal marriage, shall not be a witness to prove it illegal, to bastardize the issue. (k) A marriage, therefore, declared by statute, (l) to be *null* and *void*, must be considered, however hard the case may be, as though it did not exist. If a person contracts with another, who appears to be of full age, the contract, if such person is an infant, will be as completely void, as though the other party had been informed of that fact, at the time of the contract. This residence was not clandestine, because she was publicly in Canterbury ;—and if they did not know of the former marriage, the residence was at their risk.

But it is to be noted, that in the year 1788, the Town of Canterbury warned the man, but not the woman, to leave the Town.

The conduct of the Town of Lisbon, it has been intimated, amounts to giving a certificate. A certificate is a formal adjudication of a Town against itself. Lisbon could not take the risk of a marriage, merely because it was made in that Town ; and it is not pretended, that Lisbon had any concern in sending the pauper to Canterbury.

But the cases of the *King v. Inhabitants of Lubbenham*, (m) and the *King v. Inhabitants of Northfield* (n) decide the principle, contended for by the defendants, in this case.

2. Had, then, the Town of Lisbon a right to remove this pauper ? The plaintiffs, in their declaration, say,

(k) *Esp. Dig.* 721. *Dub. Edit.* 1794.

(l) *Stat.* 287.

(m) 4 *Term Rep.* 251.

(n) *Doug.* 659.

that she then was, and long had been, unable to support herself. They cannot, therefore, deny what they have asserted, unless the jury have found something incompatible therewith. Her interest in Lisbon is merely reversionary. The verdict states her inability, and being chargeable. The statute intended, that persons should not be removed, because they were *likely* to become chargeable ; but if destitute of means, and relations do not provide for them, and expences *actually arise* to the town in which they are, then, they may be removed. It would be little to the credit of our law, if the ability of the relations was to be settled by a judicial decision, before their poor kindred could have relief. As it respects the question between towns, it can make no difference, whether there are relations, or not, for each town must maintain its own poor, whether within the town or not. The question is now between two towns, where the pauper is settled, and not between the *pauper* and a town.

*Goddard*, in reply. Independent of the marriage, *Ruth Stevens* might have gained a settlement in Canterbury. But acts, perfectly null as between the parties, may, as between other persons, draw after them important consequences. Thus, a statute (c) declares fraudulent conveyances to be *utterly void* ; but if a person receiving such conveyance, convey *bonâ fide* to a third person, the decisions of the Superior Court have been, that such conveyance is good.

The case in *Burrow's Settlement Cases* is conclusive ; for no intimation is given, that it was decided on the ground, that the man was an incompetent witness. There was no proof of an actual marriage, but merely

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that they had cohabited together. *This case furnishes evidence, as abundant, surely, as that, of the existence of a marriage.*

The case of the *King v. Inhabitants of Lubbenham* does not come up to this. The Court there only determine the extent of a certificate. In the case of the *King v. Inhabitants of Northfield*, the question as to the marriage is not directly decided.

2. The defendants have treated *Ruth Barber* as a pauper, but she is not so treated by the verdict ; nor have we so treated her, in our declaration ; if we have, the verdict finds facts inconsistent therewith. It finds, that she is a poor, *insane* person, unable to support herself ; that her real estate in Canterbury, is worth \$60 ; that she is owner of one eleventh part of 35 acres in Lisbon, worth more than \$10 ; and that Lisbon have expended \$10 for her support. The value of her estate in Canterbury can make no difference as to her gaining a settlement there, unless it exceed \$100. Lisbon could no more remove her thither, because she had this estate there, than if she had personal estate there to that amount.

The declaration and verdict both speak of her as incapable to take care of herself, not for want of *property*, but for want of *understanding*.

The town where such person *dwells*, must provide for her, and the County Court, in the County where such person dwells, must direct how such expences are to be reimbursed. As the law now is, if a person has enough to prevent his becoming chargeable, the town, in which he is, cannot remove him, to prevent his gaining a settlement.

But, it is said, that we are estopped, by what is averred in the declaration, from saying that she is not a pauper. It is admitted, that when a fact is conceded by the pleadings, the jury cannot contradict it; but we state, that she is unable to support herself, not because she is destitute of property, but because she is *non compos mentis*. Besides, the defendants have pleaded the general issue, and, in endeavouring to prove, that she was settled in Canterbury, they have proved, that she had property in Lisbon. Had we attempted to prove this, and they objected, the doctrine of estoppel contended for might have applied.

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BY THE COURT,

The judgment was affirmed.

### Dibble v. Hutton.

MARY HUTTON brought a petition in chancery, to the County Court, stating, That she was the widow of *Samuel Hutton*; and that during his life they were tenants in common of 55 acres of land, lying in Norwalk, three fourths of which were owned by him, and one fourth by her. He importuned her to join with him, in conveying said land, representing to her, that it was of small profit to them, and that he could not sell his interest alone, without great loss. She, however, refused to comply with his request; but afterwards, to induce her to join in the conveyance, he offered, and solemnly promised, to pay to her one fourth part of the sum, for which said 55 acres sold, for her separate use, and to lodge with her sufficient security for the performance of his engagement. In consequence of which, she agreed to sell, and on the 6th of January, 1798, actually

An agreement entered into between husband and wife, during coverture, is void, and cannot be enforced in chancery against the executor of the husband.

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joined in conveying said land to *Caleb Comstock*, and *Benoni St. John*; who then executed their notes to said *Samuel* for the sum of 192*l.* 10*s.* with interest. And said *Samuel* did immediately, in pursuance of his promise, as he then declared, deliver part of said notes to the petitioner, which she kept in a drawer, in her separate custody, till the time of the death of said *Samuel*, which happened on the 16th of September, 1799.

In May, 1792, said *Samuel* made his will, and disposed of all his estate, and gave to the petitioner nothing more than that part of his real estate, which she could claim as her dower. He appointed *Nehemiah Dibble* executor of his last will, who accepted the trust, and said will has been proved, and approved. The petitioner exhibited her claim to one fourth part of said 192*l.* 10*s.* to the executor, within the time limited, by the Court of Probate, for the exhibition of claims; but the executor refused to allow it. And in October, 1799, the executor applied to the petitioner for the notes, which she so held as security, and threatened her with a suit, if she would not deliver them up to him, that he might include them in the inventory of the estate of said *Samuel*. And the petitioner did deliver them up, with an express reserve, that her claims should not be prejudiced thereby,

The executor has since received the money, upon said notes; the estate of said *Samuel*, after payment of his debts, is of the value of \$20,000; but the petitioner, notwithstanding, is left dependent upon her friends, for support, and has received no compensation for her land, and has no remedy at law. The petitioner concluded her petition by praying, that the executor might be ordered, within a reasonable time, to pay her one fourth part of said 192*l.* 10*s.* with interest.

To which petition there was, in the County Court, a demurrer ; and the petition was adjudged to be sufficient ; the facts stated therein were, upon enquiry, found to be true ; and a decree passed, ordering the executor to pay from the estate of said *Samuel*, one fourth part of the sum of 192*l.* 10*s.* with interest from the 6th of January, 1798, being in the whole \$211 3. Upon a writ of error to the Superior Court, the judgment of the County Court was affirmed.

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*Smith*, (of Woodbury) for the plaintiff in error, contended, that if giving the notes to the wife strengthened her claim, by giving them up, she relinquished any such advantage.

The contract was not to be performed after the death of the husband, but during coverture.

The question, therefore, is, whether a contract, by husband and wife, made during the coverture, and to be performed during coverture, is a legal, valid contract?

It has hitherto been considered, as one of the most settled principles in our jurisprudence, that a contract, made by a *feme covert*, especially with *her husband*, is absolutely void.

Alimony and separate maintenances, though anciently unknown, have now become common in England. A practice has, also, been introduced, of relations giving property to the sole and separate use of married women ; covenants by the husband, that the wife shall have certain benefits, have been sanctioned by their courts ; and she thus has interests separate from, and independent of her husband. And during coverture, the husband,

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through the medium of trustees, has been enabled to settle property on the wife ; but now the intervention of trustees is no longer held necessary.

Lord MANSFIELD, in the case of *Corbett v. Poelnitz*, (a) says, " That as the times alter, new customs, and new manners arise, and new exceptions and applications of " the rules of law must be made." And to be sure, manners have led the law, and law the manners, till all barriers are thrown down. And are we to go on in their tracks, not by degrees, but to take, at once, the last step, which corruption has there introduced, and bury in oblivion the principle, that a feme covert has no separate existence ?

In this State, but one divorce *a mensâ et thoro* has been granted ; and, at present, it is probable, no more will be granted.

There here exists no custom of separation from whim and caprice, though instances have occurred where tempers were very different. Of marriage arrangements not an instance is known. We happily have never heard of forming certain exceptions to the marriage contract, when framed, that the wife need not lose her independence ; nor of relations giving property to married women, to their separate use. But the idea has here been, that lines of separation were not to be drawn between husband and wife ; and the generosity of our females has not allowed them to wish to keep their property from those, to whom they have not refused their persons. Our customs, therefore, do not require the introduction of these new principles.

(a) 1 Term Rep. 8.



But if divorces *a mensâ et thoro*, and separate maintenances, and property in the hands of trustees, for the benefit of the wife, are to be sanctioned ; still it does not follow, that a contract between husband and wife is to be held valid.

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A contract opposed to sound policy is void. Upon principles of policy, what good consequences can result from pin-money, and separate establishments? While husband and wife have but one interest, you may calculate upon the most perfect harmony ; but create separate interests, and you destroy domestic tranquillity. While both go to the same purse, it may be expected, that each will promote what is the interest of both.

If such contracts have a legal existence, there must be a mode of enforcing them ; and if the wife may bring the husband in debt, he may her ; and judgments and executions may, as in other cases, be obtained.

Again, if a legal contract may be made between husband and wife, she may discharge it ; and if so, will there not be additional inducements to coercion? Separate accounts and books must be kept. If, in this case, the husband had taken these notes into his own possession, the wife might have called her husband to account ; she might have levied an execution upon his house, or land ; or transported him to prison. The idea of such a state of things cannot, for a moment, be admitted.

But, it may be said, is not justice due to this woman ? When we are investigating subjects, which will have an effect upon community, and establishing precedents, which will abide, we ought not to attend to the supposed equity of a *particular case*. In the several classes of con-

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tracts void, because against sound policy, particular instances may be found of contracts made with minors, and usurious contracts, which are perfectly fair, and equitable ; but even in those cases, the general rule must be regarded.

If society was here, as in England, and vast estates were depending upon the principle, there might be some reason for adopting it ; but, by granting this application, you destroy, at a stroke, one half of what we have ever deemed the marriage contract. That such a case was never before heard of in Connecticut, shows, that such contracts were never expected to be enforced.

But, admitting that such a contract ought to be enforced ; still, it ought to be done in a court of law, either by an action on the case, stating the facts, or by a suit on the bond.

In England, it is a common rule, that application is not to be made to chancery, where there is remedy at law ; and that chancery has jurisdiction, only in cases of fraud, accident, and trust. In cases like this, the English court of chancery has assumed jurisdiction, on the ground, that the husband was trustee for the wife. But Lord MANSFIELD has once suffered a recovery, at law, against the wife. (b)

Our courts of law have cognizance of matters of fraud ; and lately the Superior Court decided, in *Hoyt v. Maltby*, that where the obligee of a note was dead, and the obligor was administrator, and the note had been assigned, an action at law might be supported, in the

(b) 1 Term Rep. 5.

name of the assignee. So, where the obligor takes a discharge of a note from the obligee, who is a bankrupt, after notice of the assignment, an action at law lies against him. So, where there are two joint obligees, and one dies, and the other is a bankrupt, an action at law may now be brought against the executor of the deceased.

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The rule, therefore, now is, that where nothing but money is sought, and common law proof needed, courts of law can give a remedy. And it is important, that the practice be uniform, and the decisions consistent. Our statute is positive, that if there be relief at law, chancery cannot interfere. In England, there has been a constant strife between the courts of law and chancery; and it has arisen to an enormous height. But these courts are there composed of different judges; but here, where the powers of both belong to the same judges, there surely can be no disposition, on the part of one, to encroach upon the bounds prescribed to the other.

*Ingersoll*, and *R. M. Sherman*, for the defendants in error.

The doctrine, in Great Britain, is, not that all contracts between husband and wife are to be established; but only such as are grounded on good consideration, and not productive of inconvenience to the parties. Thus, in *Beard v. Beard*, (c) the court refused to enforce an agreement, made by husband and wife, because it was unreasonable.

That a feme covert may, in England, have a separate

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maintenance, is a doctrine too clear to be denied, or even doubted. *Rutland v. Molineaux*, (d) and *Herbert v. Herbert*, (e) with a variety of other cases, might be produced ; but, it has been explicitly admitted.

Gifts by the husband, to the wife, are supported in equity ; and tho' a trustee is held to be necessary, (f) yet the husband is, *ipso facto*, trustee for the wife. And a wife has, in chancery, made her husband a party to a suit. (g)

It is said, that this is a modern doctrine, not known to the ancient common law ; but the case of *Rutland v. Molineaux* is an ancient case, and the doctrine an ancient doctrine, coeval with the English courts of equity.

It is also said to be impolitic to adopt the principles here ; that we have not arrived to that degree of luxury and refinement, to which they have in England ; that divorces *a mensâ et thoro*, and separate maintenances, are almost unknown. We do not contend for frequent divorces, nor for separate maintenances. But in this country, there are more of the middling class of people, who live separate, than in England ; and as to divorces, we have ten to their one.

Again, it is said, this will introduce controversies between husband and wife, which will be maintained in courts. But admit the wife's right to property, and she will require for it the same protection, that she now has for her person ; and no greater inconvenience will result from her going to law upon one subject, than upon the other.

(d) 2 Ver. 64.

(f) 1 Font. Eq. 92.

(e) Prec. Ch. 44.

(g) 1 Atk. [278,] Cecil v. Foxon.

Shall we not then, adopt the English law upon the subject? Experience is our best guide; and more evils have arisen by departing from English rules, which applied to our situations, than have ever resulted from adopting them.

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It seems to be admitted, that the justice of the case is with the defendant in error. But it is said, dangerous precedents have been established, by attending to the justice of a particular case, without attending to the effects of the principle. We, however, have the example of the English, who have not experienced the ill effects anticipated here. There are, indeed, evils, arising from decisions, by which they are shackled; such decisions our courts have wisely rejected; yet on this subject, we hear no complaints.

But the principle of a separate interest between husband and wife, has been recognized, by our own Courts, in the case of *Parsons v. Hosmer*. (h) And, in another case, (i) without attending to the English decisions so fully as we ought, it has been decided, that a married woman may devise her estate to her husband, without a power; and thus, a separate interest has been recognized.

When, therefore, we find the English rules so clear, and the justice of the case so apparent, and no rule of our own to oppose them; it is important, that their decisions be adopted here, as our common law, and that books, our only guide, should be followed.

But, we are told, that if we have any remedy, it is at

(h) 2 Root. 1

(i) *Kellegg v. Adams* S. C. E. 1788.

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law. Were we about to form a constitution; it might well be agitated, whether it were best to have courts of law and chancery in separate jurisdictions ; but the distinction has prevailed, ever since the settlement of this country. And as long as courts of chancery must exist, neither reason nor policy requires, that they should be deprived of part of their jurisdiction.

The line between courts of chancery and courts of law, is, that there are different modes of getting at the facts, and different relief. But, these are not the only instances, in which they differ ; our ancestors had the idea, that courts of chancery were to soften the rigour of the common law. The distinction prevails in Great Britain, and in this country, to this day.

Courts of law, previous to the existence of a court of chancery, adopted rules, from which they could not vary ; as in case of bonds with penalties, and forfeited mortgages. So, in case of a chose in action assigned, the interference of chancery has been found necessary, in this State ; our legislature having often refused to make notes negotiable.

In case of accident, as where a contract, by mistake of the scrivener, was drawn wrong, as in *Parsons v. Hosmer*, chancery has interfered, and must interfere. A court of law, in that case, would never have heard the testimony.

A number of cases have been decided, where money was the only object, and yet chancery interfered. (j)

All these rights, which have been born and nourished

in courts of equity, are still to remain there, unless the legislature see fit to remove them. Our statute gives chancery jurisdiction, where remedy cannot be had at law ; that is, where remedy could not *then* have been had at law.

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If the principles, advanced by Lord MANSFIELD, in one case, (*k*) were to be adopted, we might, perhaps, have a remedy at law ; but that case is overset, by Lord KENYON, (*l*) who admits that relief may be had in a court of equity.

And what subject, ever more peculiarly required the assistance of a court of equity, than this? At law, the wife could not controul a suit ; but the husband could, at any time, discharge it. It is no object for her to get an execution against the husband ; but upon a petition, a court of chancery can make such rules as are best calculated to secure the property, and can administer such a remedy, as would be most effectual.

*Daggett*, in reply.

It is important, that the bounds between courts of chancery, and courts of law, should be fixed, that the rule should be uniform. For several years past, we have been told, that where a man seeks nothing but money, and wants only common law proof, a court of law could grant him relief. So we were told, in *Backus v. Bacon*, and so, in *Hoyt v. Maltby*. If it should be decided, in this case, that a petition in chancery can be sustained, the judgments in those cases must be erroneous,

(*k*) *Corbett v. Peelnitz*.

(*l*) 3 Term Rep. 545. *Marshall v. Rulston*.

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It is said, that courts of chancery sustain jurisdiction in cases of mortgages ; but they never do in any case, where remedy at law could be had. One class of petitions is to foreclose, the other is to redeem ; neither of which can be granted in a court of law.

The ground of interfering, in case of a mistake, is merely to supply testimony. Here, the ground taken is, that a court of law could not regard the contract, during the life of the husband, and, therefore, cannot, after his death. Is it meant by this, that the contract is void ? No ; but the remedy, it is said, must be the same after his death, as during his life. But, suppose this contract had been made, between this woman and a stranger, before the coverture ; would not the remedy have been different after the death of the husband, from what it was during his life ? Is not the suspension capable of being removed ? The argument, therefore, if it proves any thing, proves too much.

But, it is urged, that during the coverture, she might have gone into chancery, against her husband, upon this contract. “ I will give you part of the avails of my bargain, when received,” was the engagement (on the part of the husband. ) But would a court of chancery sustain a petition against a husband, for the recovery of money ? Can such an instance be shewn in Connecticut ? (*m*)

The fate of this application ought to be the same, in a court of chancery, or a court of law.

It is agreed, that the ground for the interference of courts of chancery, in such cases, is general. When



called upon to define the contracts to be enforced in chancery, between husband and wife, the counsel give the general reason, that *Powell* gives for enforcing all contracts in chancery. The amount of it, therefore, is, that chancery will enforce a contract between husband and wife, if they would have enforced the same contract, made by other persons, between whom there was no connection.

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Upon this principle, the intervention of trustees is wholly unnecessary ; equally idle is it, to call the husband a trustee. Upon this principle, the wife could enforce this contract, and procure an execution against her husband.

That a woman, under certain circumstances, may possess property, with which the husband shall have nothing to do, may be admitted ; but that is not this case. This is nothing more than an agreement made with the wife, that if she will convey this property, the husband will pay her so much money.

A feme covert can take nothing, by gift, from the husband, (n) except by the custom of a particular place ; and the principle established by the Court of King's Bench, in *Marshall v. Rutton*, oversets the doctrine contended for in this case.

How ridiculous is it, that the wife should recover property of the husband, and obtain execution, which, upon principles of the common law, he may destroy, as soon as it is obtained ; or if he pays it with one hand, he may take it away with the other !

(n) Co. Litt. 112

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Separate maintenances, and agreements to separate, and convey property to the wife, for this purpose, have never been brought before our courts. How they would decide upon them is unknown. If they would declare a bond for such purpose to be void, the main support of this case is taken away.

In the case of *Slanning v. Style* (o) the *Chancellor* allowed the repayment out of the estate of the husband, either on the ground of a legal agreement, or implied contract. Upon such principles, the accounts of husband and wife are to be settled, as those of any neighbours, and they are merely copartners, and each may make contracts, without the other.

This case, then, either rests on contract, or on the equitable circumstances attending it. As to the first, are our courts ready to enforce a *contract* between husband and wife, when, if there is a clear principle of law, it is, that such contract can have no effect?

On the other ground, that the wife has sold her land, and the husband has received the avails, laying aside the promise, it follows, that in every case, where the husband has the benefit of the wife's real estate, she may have an action on the implied contract. And altho' in most cases, a consideration is paid to the wife, yet if a suit is brought after the death of the husband, his executor will be obliged to produce the evidence of such payment.

The judgment of the Superior Court was reversed, unanimously, HILLHOUSE, *Ast.* being absent.

BY THE COURT. The petitioner's claim, in her bill in chancery, rests on the ground of the husband and wife's contract, or a combined view of the facts contained in the bill. Hence, the questions made relate to the competency of a husband and wife to contract with each other ; the competency of the wife to have estate for her separate use ; and the equity of the particular case.

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By the common law, the husband and wife are considered as one person in law, the existence of the wife being merged in that of the husband, or suspended during the coverture. As a consequence of this union of persons, the principles necessarily result, and have been established, that husband and wife cannot contract with each other, nor the husband make a grant or gift to the wife, nor the wife have personal estate, to her sole and separate use.

If these principles are to be received and applied, in their obvious import, to this claim, they, at once, determine all the questions, that arise in considering the case. They preclude the idea of the husband's and wife's competency to contract with each other, and the wife's competency to have, during *coverture*, personal estate to her separate use ; and these being precluded, no equity arises out of the facts in the case, which, consistently with those principles of the common law, can be recognized by a court of chancery. Nor, indeed, is any equity perceived to exist in this case, to distinguish it from the ordinary transaction of the wife's estate being sold, and the avails thereof coming, in personal estate, to the husband.

It is, however, insisted on, that those principles of the

1804. common law have been qualified, and modified, in the courts of chancery, in England, in such manner, as to recognize the wife's right and competency to have personal estate, to her separate use, and the validity of certain contracts between husband and wife ; and that those qualifications and modifications, which have taken place in the English courts of chancery, ought to be adopted in ours.

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The construction and principles, assumed by the English courts of chancery, on these subjects, are correctly stated. The important consideration is, whether they are to be incorporated into our chancery system.

In tracing the history of the English chancery, on this subject, it is found, that the doctrine of the wife's separate personal estate, a little more than a century past, since the emigration of our ancestors into this country, first insinuated itself into practice. It was not received without difficulty ; but it gradually gained ground, and soon introduced the principle of contract between husband and wife. Both have advanced, and been extended, till a system has grown up, widely different from the principles of the ancient common law, upon this point, and others arising out of the marriage relation.

It owes its rise to that state of manners and society, which it has followed, and accommodated.

By a kind of fiction, the husband is considered a trustee for the wife, as to her separate estate ; and, on the ground of its being trust estate, chancery has taken cognizance of it ; and a husband and wife, have become suitors, and litigant parties, against each other, before the court.

The chancellor adapts the proceedings and decree of the court, to the intimate relation between the parties.

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The principle, that governs with respect to contracts between husband and wife, does not appear to be definite. Some kinds of contracts are recognized and enforced, but a wide latitude is left for the discretionary power of the chancellor.

The system is complex, originating numerous, complicated questions, as to the relative rights and property of husband and wife, and changing the form of legal proceedings.

It is unnecessary to enter on a detail of those manners, different ranks, and general state of society in England, which induced the system; they greatly differ from ours.

At the time of the emigration of our ancestors from England, the principles of the common law, on this subject, were in full force, unqualified by the modifications of the court of chancery: they have ever been received and applied in their unqualified sense, both in our courts of law and chancery.

This is a case of novel impression; the maxims of the ancient common law, on this subject are plain and simple; our state of manners and society do not require that they should be relaxed, or qualified. The principles, therefore, which govern in the English courts of chancery, ought not to be engrafted into our chancery system; but those of the common law remain unimpaired.

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## Todd v. Potter.

In the Court below,

JOHN POTTER, *Plaintiff*; CALEB TODD, and HEZEKIAH TODD, *Defendants*.

A judgment against garnishees, that they are jointly, and severally, agents of the absconding debtor, is good.

A finding of facts by the court, in these words, "the court are of opinion," &c. is a good finding.

**T**HIS was a *scire-facias* against the defendants, in which they were described, and alleged to be so described in the original writ, as attornies, factors, agents, trustees, and debtors, both *jointly*, and *severally*, to *Moses Todd*, an absent and absconding debtor.

To which the defendants pleaded, that they were not jointly, nor severally, agents, attornies, &c. nor had they any of the estate of said *Moses* in their hands. The Superior Court rendered judgment, as follows: "This Court, having fully heard the parties, with their exhibits, proofs, and counsel, and on consideration, are of opinion, that, at the date, impetration, and service of the plaintiff's said original writ, and when said copies were left with them, the defendants, they, the defendants, were, jointly, and severally, the agents, attornies, trustees, factors and debtors, to the said *Moses*, and had the estate of the said *Moses* in their hands. It is thereupon considered, by this Court, that the plaintiff recover of the defendant," &c.

The defendants brought a writ of error, and assigned the following errors:

1. That the declaration is insufficient.
2. That the defendants are alleged to have been *jointly*, and *severally*, indebted to the said *Moses*, at the

date of said writ, and they could not be *jointly* sued for debts, *severally* owed by them to said *Moses*.

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3. That by the finding of the Court, it appears, they were jointly and severally the agents, &c. of said *Moses*; and it is not ascertained, by the finding, to what amount they were jointly, or individually, liable, for debts of said *Moses*.

*W. Hillhouse*, for the plaintiffs in error.

1. In the *scire-facias*, the defendants were called upon to disclose what property they jointly, and severally, owed *Moses Todd*. To allow debtors thus to be joined, would be productive of the most injurious consequences; for if one owed ten dollars, and the other ten times ten, each would be liable for the whole. The Superior Court so considered it, in *Boardman v. Stewart*. (a) In that case, they are not said to be joint agents; but in this, they are said to be severally, as well as jointly, indebted. Upon this issue, therefore, several as well as joint debts might be proved.

It may be said, that every thing is to be presumed in favor of a verdict. The rules are the same here, as in England, and by them, a verdict cures only matters of form. (b)

2. This is a statute proceeding, founded upon the custom of London, by which it is necessary to describe the specific debt, or thing attached. The ground of liability should appear, either in the *scire-facias*, or the pleadings, or else the court should find what effects the gar-

(a) 1 Root 473

(b) Co. Litt. 227.

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nishee had in his hands ; otherwise, he will be deprived of the benefit of that part of the statute, which was meant to discharge him from the claims of his creditor.

In England, the amount of the debt is always found, and then the damages. The *scire-facias* is in nature of a bill in chancery to procure a disclosure. There, the court must find the facts ; here, they have neither found what, nor how much, the debt was.

3. The Court have found nothing on which to ground a judgment. They do not *find*, that the defendants were agents, &c. but *are of opinion*, that they were. If, in like case, the jury, instead of *finding* the facts, were to give an opinion merely, it would not be good. (c) Upon such subjects, the old established forms ought to be adhered to ; innovations are dangerous.

*Daggett*, and *Baldwin*, for the defendant in error.

1. In the original process, *Caleb* and *Hezekiah Todd* were described as jointly, and severally, indebted to *Moses Todd*; and in the *scire-facias*, it was necessary to recite the former description. But, after that, we might close with a demand against them jointly ; and altho' we have said jointly, and severally, the last is mere surplusage, and *utile per inutile non vitiatur*.

Two persons may as well be joint and several trustees, attornies, or factors, as debtors. The demand we made, is a demand upon them to shew cause, why judg-

(c) 1 Root 466, *Bacon v. Childs*. 2 Root 282, *Knowles v. State*, Gro. Car. 442, *Slocomb's case*. Id. 580, *Reymond v. Burbedg*. 3 Bulstrode 92. Gro. Car. 336, *Robins v. Saunders*.



ment should not be rendered against *them*; *i. e.* against them jointly, for the joint and several debt.

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If A. had a joint and several note against B. and C.—might not the creditor of A. state, that B. and C. were jointly and severally indebted to him, according to the truth of the case? This might not be necessary, but it would not vitiate the proceedings; and if the declaration stated, that they were jointly indebted, and the court found them indebted jointly and severally, such judgment would be good; for it would only be declaring the law upon a joint debt, *viz.* that it is joint and several. If they owed enough jointly, and also severally, there was basis sufficient for the judgment. But if the joint debts had equalled only part of the claim of the attaching creditor, and there had been likewise separate debts, the court would have had nothing to do with the separate debts; and it would be presumed that they found the joint debts equal to the amount of the judgment.

2. But it is said the judgment should be more particular. The plaintiff cannot be required to state, in his *scire-facias*, the specific debt, due from the defendant to the absconding debtor; for it is impossible for him to know it. The defendant cannot be required to state it in his plea; and the plaintiff can state it no better in his replication, than in his declaration. The issue is good without it; and the judgment, which answers that issue, is, consequently, good.

It was necessary to make a statute, to compel the court to place upon the record the facts, upon which they found a decree in chancery. In this case, no statute requires a finding of the facts; it cannot, therefore, be necessary.

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It is said, the Court have not found the amount of the indebtedness of the agents. But how can the Court get at that fact? The garnishees may refuse to disclose, and besides, the Court are not to enquire into, and settle the accounts between the garnishee and his creditor, while the latter is not a party.

In no case can it be necessary, or, indeed, of any use, to find the sum, except where the garnishee owes less than the sum claimed of the absconding debtor; and then, the garnishee will, for his own sake, shew what the sum is. The practice upon this subject has been too long adopted, and too uniformly sanctioned, to be now overthrown.

3. It is objected, that the judgment is not expressed in a technical manner. The words are, "The Court are of opinion, that the defendants are agents," &c. and, "it is considered that the plaintiff recover." The case of *Knowles v. State (d)* is very different from this. There the Court "were of opinion, that the defendant pay a fine," without having found him guilty. The decision in the case of *Bacon v. Childs (e)* is correct; but does not bear upon this case. Here, the form is substantially preserved. Innovations it is admitted are dangerous, but innovations upon words are the least so. In England, the jury only find the facts; the court determine the law. Here, the court may decide both; but is it necessary, that they preserve the same form that the jury do, and say that "upon their oaths" they find the facts?

The form of the judgment in England is, "That the record, &c. having been seen and understood, for that it seems to the court," &c. "Therefore, it is considered

(d) 2 Root 282.

(e) 1 Root 466.

"that the said A. B. recover," &c. (f) The words used here are surely as strong, as the words "*it seems to the court.*"

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*Smith*, (of Woodbury) in reply.

1. A judgment rendered against two debtors *jointly*, because they *severally* owe, is so manifestly unjust, that it requires few words to evince it. If, in this case, they did not mean to claim of *Caleb* and *Hezekiah Todd*, except as they were jointly liable, why should any thing be said about a separate liability?

In the *scire-facias*, the defendants are described as agents, &c. and *jointly*, and *severally*, liable. The plea says they were not jointly, nor severally liable; and the Court are of opinion, that the defendants were jointly, and were severally, indebted. What more could have been said to describe a several, as well as joint, liability? If, under this issue, evidence had been offered, that a several debt existed, could it have been refused? Had the court found only a joint liability, it might have been good; but the judgment is now as defective as the declaration, and cannot, therefore, aid the declaration. Presumptions ought not to be needed to support a judgment.

In England, where to several counts there is a general verdict, and one of the counts is bad, judgment will be arrested. (g)

2. Here no foundation is laid for damages, or at least for more than nominal damages; for it is not said,

(f) 3 Bla. Com. Appen. xxv.

(g) 3 Term Rep. 433, *Hancock v. Haywood*.

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that the *Todds* are indebted in any sum. Perhaps the plaintiff need not specify the debt, in the *scire-facias*; but it must be known, at the time of the judgment. In book debt, the amount is always stated, and in *Grant v. Jackson* (*k*) the declaration was held bad, because no rule of damages was given.

The record, here, shows nothing as a rule of damages; and if *Moses Todd* should sue *Caleb* and *Hezekiah Todd*, no person can tell, whether the note, or account, has been satisfied, or not.

Again, the principle, for which we contend, becomes important, because one of the garnishees may want to compel a contribution from the other; and, in that case, he must show on what account the former judgment was rendered. The practice, which we oppose, is inconvenient, and dangerous, and has no precedent to support it, but it may be, in some measure, obviated, by the Court's finding the facts. To this, it is objected, that the garnishee will not perhaps disclose the sum; but if he will not, the court may, as in other cases, commit him, and if he still refuses, judgment may be taken for the whole sum.

3. No facts are legally found. Either the technical language must be used; or the language, which, in common parlance, would be understood, must be admitted. If this is allowed, there can be no rule; and when the case of *Bacon v. Childs* is agreed to as law, it is conceded, that there is a technical language, absolutely necessary. It will not be contended, that it is sufficient for a jury to say, the *fact seems to us to be so*; and when the Court are

(*k*) Kirby 90,

acting as jurors, they must find those facts technically, as well as the jury.

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In *Knowles v. State*, the Court treat the *finding*, as well as the judgment, as erroneous.

The English forms, which have been cited, do not compare, as they were upon demurrers, and writs of error; there the court find no facts; their precedents, therefore, cannot apply. But the finding of a jury, and of the court upon bills in chancery, are much more analogous to the present case, and must be decisive of it.

BY THE COURT,

The judgment was affirmed.

### Nichols v. Leavensworth.

In the Court below,

WILLIAM LEAVENSWORTH, *Plaintiff*; JOHN NICHOLS, *Defendant*.

THIS was an action of book debt.

The general issue was pleaded, and auditors appointed. They reported, that at the hearing before them, the parties exhibited their books, and the charges therein made, within six years from the service of the plaintiff's writ; and the plaintiff claimed, that sundry of the charges of the defendant were for articles delivered, and services rendered, by the defendant, in favor of the plaintiff, to the amount of 49*l.* 11*s.* 8*d.* in payment and satisfaction of good and legal claims, which the plaintiff, at the time of such service, and the delivery of said articles, had, upon

In an action of book debt, the plaintiff may exhibit an account of more than six years' standing, to countervail the account of the defendant, for articles delivered within six years.

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book, against the defendant, previous to said six years ; and, that said articles and services were received by the plaintiff, and by the plaintiff and defendant applied, in satisfaction of such the plaintiff's claim on book, against the defendant. The plaintiff, therefore, prayed, that such charges of the defendant, to that amount, might be disallowed, and that the books of the plaintiff and defendant might be examined, and the parties examined, on oath, relative to said claim. This was objected to by the defendant, and the objection overruled by the auditors. The parties and their books were, consequently, examined, relative to said claim ; and the auditors found, that the charges of the defendant, to the amount of 49*l.* 11*s.* 8*d.* were so rendered, delivered, and received, and were so applied by the plaintiff, without any directions given, or objections made, by the defendant. Wherefore, they disallowed that sum from the demands of the defendant, and found the defendant in arrears \$414 12.

To this report the defendant remonstrated, and for cause assigned, that the same was insufficient in the law. The Court accepted the report, and rendered judgment for the plaintiff.

*Daggett*, for the plaintiff in error.

*Leavensworth* sues *Nichols* on book ; *Nichols* exhibits the account, which he has within six years ; *Leavensworth* claims, that previous to six years, he had charges against *Nichols*, and they ought to be enquired into ; and the auditors find that the plaintiff, without any directions given, or applications made, by the defendant, did apply these charges of the defendant to his old account. The statute, so far as it is applicable to the

present case, is, "that all book debts, that shall not, "within six years after the contracting such debt, be "either sued for, balanced, or accounted for with the "original debtor, his attorney, agent, or other lawful "successor, or substitute, and an account or balance "thereof witnessed, by subscribing the debtor's or accountant's name to the creditor's book, such debt shall "not be recoverable in any court in this State." (a)

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It cannot be contended, that this account is within the exceptions of this statute. It was not sued for, accounted for, nor was an account subscribed.

It must, then, have been allowed, because *Leavensworth* made a charge, and *Nichols* soon after delivered articles; and one of the parties chose to consider this as balancing the accounts, without any agreement of the other.

This case is within the mischiefs, which the statute was designed to prevent. It is unreasonable, that after this length of time, the parties should, by their own oaths, enforce such claims.

There can exist no difference between this case and one where the plaintiff claims to recover for articles delivered more than six years since. The lapse of time must have the same effect upon the memory, in one case, as in the other; and the testimony of the parties is entitled to equal weight, in both cases.

*Baldwin*, and *Smith*, (of New-Haven) for the defendant in error.

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It is certainly questionable, whether an award of auditors can, in this way, be impeached ; but we are ready to meet the question, as if fairly before the Court.

This statute must be construed according to the intention of the legislature, who enacted it, and is not to be extended. There is nothing in the statute prohibiting an enquiry like this. The statute only prevents a *recovery* of such debts. From the award it appears, that we have not *recovered* for any such articles, as were not delivered within six years. *Nichols* had a right to direct the application of the payment ; but if he did not do it, the other party had a right to direct it.

The auditors had a right to examine whether the account of the defendant was not due ; and this could not be determined without examining the whole account between the parties. When the articles in controversy were delivered by *Nichols*, there was nothing due to him ; and a debt cannot be *created*, by *length of time*.

Suppose A. delivers B. 100*l.* and, the next week, B. returns it ; can B. as soon as six years have elapsed, bring a suit against A. and recover the 100*l.* he delivered him ? Or, suppose in this case, *Nichols* had sued *Leavensworth* for 49*l.* and *Leavensworth* had no claim ; could not *Leavensworth* show his book to prove, that these articles were delivered by *Nichols*, to cancel a claim against him ? If this is not allowed, no one will be safe.

The principles of the statute are not violated by this construction ; former precedents are sanctioned ; and perfect justice is done.



*Edwards*, (of New-Haven) in reply. The statute respecting book debt (b) is of such a nature, and such strange constructions have been put upon it, that it ought to be restricted.

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At the time of the emigration of our ancestors, there was no statute of set-off. The third section of the statute concerning book debts operates as a statute of set-off; and also permits the defendant, if his claim surmounts the plaintiff's to recover the balance. Suppose this were a mere statute of set-off; an account more than six years old could not be set-off; for nothing can be set-off, but what may be recovered.

The legislature have determined, that no book charge shall be recovered, after six years, for the purpose of cutting up stale demands, and to prevent the mischiefs arising from forgetfulness. To make the remedy commensurate with the evil, it must be extended to cases like this. Upon the principle, which the auditors have adopted, *Leavensworth* may bring in an account more than six years old, to balance the account of *Nichols*. *Nichols* may then bring in an account still older to meet that; and thus the enquiry may be extended to the accounts of the whole lives of the parties.

BY THE COURT,

The judgment was affirmed.

(b) Stat. 135.

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## Nichols v. Taylor.

**T**HIS case depended upon the same principles as the last; and the plaintiff, upon the decision of that, immediately suffered a non-suit.

## Bostwick v. Lewis.

In the Court below,

EDMUND LEWIS, *Plaintiff*; BENJAMIN BOSTWICK, AUSTIN NICHOLS, EBENEZER SMITH, and DANIEL SMITH, *Defendants*.

**T**HIS was an action on the case. The declaration was, in substance, as follows :

An action for fraud in the sale of lands, will lie against the grantor and others, notwithstanding the covenants of seizin in the deed.

For what misrepresentations as to the quality of land, an action will lie.

In January, 1796, the defendants affirmed to the plaintiff, that *Austin Nichols* was the owner and proprietor in fee, of a tract of land in Virginia, containing 45,000 acres; and well knowing that he was not the owner, and that said land was of no value, but mountainous and rocky, and unfit for cultivation, they conspired together, to induce the plaintiff to buy a part of said tract, at 25 cts. per acre; and intending to cheat and defraud the plaintiff, and to share among themselves the profits, did, to effect said purpose, *severally*, and *respectively*, affirm and represent to the plaintiff, that said *Nichols* was the owner of said tract, and that the same was of an *excellent quality*, and well adapted to agricultural purposes. And in pursuance of an agreement and conspiracy entered into by the defendants, and to induce the plaintiff to purchase, *Ebenezer Smith* and *Daniel Smith* did falsely affirm to the plaintiff, that they had had

great opportunities to be acquainted with the title and quality of said land, and that it was of an excellent quality, worth more than 25 cts. per acre, and could not be purchased for less, and that said *Nichols'* title was good and valid.

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And said *Bostwick*, in pursuance of an agreement, combination, and conspiracy, made by the defendants, pretended, and ostensibly agreed, to become a purchaser of one fourth part of said tract, at 25 cts. per acre ; and proposed to the plaintiff to join with him in a purchase of said tract, at said price ; and represented, that it was of an excellent quality, and that said *Nichols'* title was good and valid, that he had exerted himself to find out every thing respecting it, that it was well worth, and could not be purchased for less than, 25 cts. per acre, and unless purchased immediately, the opportunity would be lost.—And said *Bostwick* presented to the plaintiff a *pretended map* of said land, and falsely and fraudulently affirmed, that said map contained a true description thereof ; and by said map, said land was not mountainous or broken, but *good* intervale land, well adapted to agricultural purposes. And the plaintiff, relying upon the affirmations and representations, made as aforesaid, did on the 12th of February, 1796, purchase of said *Nichols*, the one fourth part of said tract of land, and paid therefore the sum of \$ 2812 25, which sum the defendants divided between themselves. And said *Nichols*, in pursuance of said agreement and combination, did give to the plaintiff, and said *Bostwick*, and two others, a *deed of said tract of land*. And said *Nichols* had no title to the land, at the time of executing said deed ; and said *Bostwick* never was a purchaser of any part of said land, but ostensibly, and to decoy the plaintiff, and in pursuance of said combination ; nor did

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he ever pay any thing for said land, but said *Nichols*, as soon as said deed was executed, discharged said *Bostwick* from the payment of any thing on account of said land.

And the plaintiff, in consequence of said conspiracy, has lost all the money, which he paid said *Nichols*, and is injured, &c.

Before the Superior Court, *Nichols* was defaulted; and the other defendants pleaded, severally, *not guilty*. On the trial, the plaintiff exhibited in evidence a deed of the described land, to him and others, from said *Nichols*, with the usual covenants of seizin and warranty, which deed it was admitted by the parties, was duly executed and delivered, by said *Nichols*, attested by two witnesses, and acknowledged before two justices, in this State. The plaintiff then offered in evidence certain patents; in favor of *Jacob Pate*, and others, to prove, that, at the time of the execution and delivery of said deed, about 9000 acres of the land pretended to be conveyed had been taken up, surveyed, and granted, by the Commonwealth of Virginia, to *Jacob Pate*, and others, and, that the title to said 9000 acres was not in said *Nichols*, but in said *Pate* and others; and that said *Nichols* had then no right to sell the same. The plaintiff also offered to prove, by other testimony, that the residue of the land not patented, was of no value. The defendants objected to any proof of a defect of title; because the plaintiff had his remedy, by a suit upon the covenants in the deed. The Court admitted said patent to be read in evidence, on the ground, that, by such testimony, the plaintiff might evince, that the land attempted to be conveyed by said deed, exclusive of the 9000 acres, was of no value.

A verdict was found, and judgment rendered, against two of the defendants, who brought a writ of error to this Court, and assigned for cause of error, that the Superior Court admitted the testimony objected to.

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The cause was argued by *Ingersoll*, and *Smith*, (of Woodbury) for the plaintiff in error; and by *Edwards*, (of New-Haven) and *Daggett*, for the defendant.

The Counsel for plaintiff in error contended, that the evidence of the patents ought not to have been admitted. When the deed was produced, it appeared, that *Lewis* had a remedy upon that. All parol contracts, or affirmations, must have been swallowed up in the covenants. The party can obtain no more damages, in an action on the case, than in an action on the covenants; and in neither case, is it necessary to shew, that the defendant knew he had no title. The ground, on which actions for fraud have been sustained, is, that a title has been given, but it was worth nothing. But in this case, the moment a deed was exhibited from *Nichols*, with covenants of seizin and warranty, before *Lewis* could proceed, except upon the deed, he must shew *Nichols* to be a bankrupt. There is no authority to show, that such action was ever sustained in Great Britain.

But, in this case, there are other persons, not parties to the deed. This action will not lie against them and *Nichols*; for there is another remedy against *Nichols*; and, consequently, no evidence can be produced to show, that the other defendants combined with *Nichols*.

It may be said, the deed is not a valid one; but between the grantor and grantee it is good, by the laws of Virginia. Besides, it is too late for *Lewis*, after having exhibited

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this deed in evidence, as a good and valid deed, to say, now, it is not good. If he has no deed, then he ought not to recover. If such an action as this would lie, there would be two concurrent remedies for the same thing.

The evidence offered was wholly irrelevant, for showing that the title to part of this land was not in *Nichols*, could not tend, in the least, to show, that the remainder was of no value.

In this declaration, no cause of action is shewn. The strongest allegations are, that the defendant represented the land as excellent, well worth twenty five cents per acre. Nothing is affirmed as fact, but an opinion merely is given. If a man declares, that there is a mountain of salt, or lake of whisky, upon his land, and there is none, he states a fact ; and this declaration, if not true, may be a ground of action. But if he states, that he has an excellent horse, well worth \$ 50, and the horse is not worth that sum, no action will lie, for he might have examined and judged for himself. A mere over estimation will not be a ground of action. The maxim, *caveat emptor*, applies. An extravagant representation of the value of a small farm in this State, would not be a ground of action ; and the reason of the case is the same, if the land lies in Virginia.

The law will not encourage the indolent, nor pay the buyer for shutting his eyes. In *Pasley v. Freeman*, (a) BULLER, J. says, " the buyer of land is at his peril to see to the title." Mere affirmation, unaccompanied with fraud, will not furnish a ground of action. (b)

(a) 3 Term Rep. 56.

(b) 2 East 314, *Parkinson v. Lee*,

There have been decisions in the Superior Court, in favour of a recovery for fraud in the sale of lands. A state of things has existed, which led that Court to adopt principles, which, in less tumultuous times, would never have been recognized. But these opinions have never been sanctioned, by this Court ; and the case of *Pollard v. Lyman*, (c) so far as it went, was in opposition to the principle contended for.

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The Counsel for the defendant in error, contended, that if the testimony ought to have been admitted, the judgment is correct, though the reason given for admitting it may be incorrect.

The evidence was properly admitted, although *Lewis* had a warranty deed, and although *Nichols* was responsible. For, damages are not now claimed of *Nichols* solely, but of him and others, for having combined with them to defraud the plaintiff. *Lewis* took this deed, because *Bostwick* and others represented to him facts, which did not exist ; and now it is urged, as a reason, why they should be liable, that they did actually induce the plaintiff to receive the deed. Having a right of action against all, we are not bound to resort to one only.

We have a right to this action, because in this, *greater damages* may be recovered, than in an action on the warranty. The rule there is, the consideration, and the interest ; but in cases of this kind, this Court have established a different rule. In actions of fraud, there is, indeed, no rule of damages. The Court cannot restrict the jury, as to the damages. This testimony was, therefore, proper, to increase the damages. (d)

(c) Ante 155.

(d) Vide *Bostwick v. Lewis*, ante 33, and *Norton v. Hatheway*, decided in the Supreme Court of Errors, in 1800. The original ac-

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Notwithstanding this deed, *Lewis* had a right to go on, and prove his case. A party is not to be estopped from proving his case, because he has produced evidence,

tion, in the latter case, was brought by *Joshua Hatheway* against *Philo Norton*, *Austin Nichols*, and four others, for fraud in the sale of Virginia land. The declaration charged the defendants with having entered into a combination to defraud the plaintiff. To effect their purpose, two of them applied to the plaintiff, and proposed to sell him 25,000 acres of land, lying in Russell County, in Virginia, and to induce him to give a great price for the same, they affirmed to him, that the land was of an excellent quality, having a rich soil, and covered with valuable timber; that it was well worth half a dollar *per* acre; and that the title was unquestionable. The plaintiff, relying upon these representations, agreed to purchase said land, and to pay for the same 2s. 3d. *per* acre. The two defendants above mentioned then executed a bond to the plaintiff, in the penal sum of 6000*l.* either to procure for him, from the Commonwealth of Virginia, a patent of the land, or to give him their warranty deeds thereof, within a specified time; and the plaintiff, on his part, gave his bond, in the penal sum of 6000*l.* conditioned for the payment of the purchase money, amounting to 2812*l.* 10s. These defendants procured, within the time specified, and presented to the plaintiff, a patent, purporting to be a grant of 20,000 acres of land from the Commonwealth of Virginia, signed by the governor, which the plaintiff refused to accept. The representations made by them to the plaintiff were false; the land was not of a good quality; the defendants had no title to it; and Virginia had none, at the time said patent issued.

The defendants pleaded, severally, *not guilty*; issue was joined to the jury; and a verdict was found, and judgment rendered, for the plaintiff.

The principal exception, taken in error, was, that no legal ground of damages appear in the declaration.

*Edwards*, (of New-Haven) for the plaintiffs in error.

*Brown*, and *Mills*, for the defendant.

BY THE COURT,

The judgment was affirmed



which may prevent a recovery. Not a *dictum* can be shewn to support such an idea. In England, the plaintiff may be non-suited ; but there is no such practice here. But the regular, and perhaps the only way, for them to take advantage of this deed, was, to have pleaded it. The deed introduced is not valid by the laws of Virginia. By the laws of that State, a deed must be proved by three witnesses, and acknowledged before some court in the neighbourhood, where the land lies. Deeds executed out of the State, must be acknowledged before some court of law, or mayor, &c. and must be proved by three witnesses. This deed, therefore, is nothing more than evidence, that a bargain was made.

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But, it is said, there are no allegations in the declaration, which authorize a recovery. It is stated, that the defendants combined to cheat the plaintiff ; that they severally affirmed, that the land was of an *excellent* quality, not mountainous, nor rocky, well fitted for agricultural purposes ; that *Bostwick* shewed him a map, on which the land appeared to be *intervale*, well adapted for improvement. Representations more strong could not have been made.

But, it is said, no action can be maintained for fraud in the sale of land, and this is represented to be the law of Great-Britain, and the doctrine of our ancestors. The case of *Roswel v. Vaughn*, (e) is the only case, which goes to prove the doctrine advanced, in any degree ; and that has been long exploded. In *Risney v. Selby*, (f) where the seller affirmed, that he received a certain rent, and it proved to be less, the plaintiff recovered,

(e) *Cro. Jac.* 196.(f) 1 *Salt.* 211.

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It is admitted, that actions of this kind have been supported in the Superior Court ; and the reasons in *Pollard v. Lyman*, in this Court, do not counteract these decisions. In *Norton v. Hatheway*, they must have been recognized. The principles of that case were the same as of this, although it was not so strong a case. If, then, it were clear, that such actions could not be sustained in Great-Britain, our courts have gone too far to recede.

The practice of procuring decoys is the most effectual instrument of fraud, that was ever devised ; and has always been held sufficient to vitiate a contract, as in cases of insurance, &c. It is as consistent with justice, as with sound policy, that such persons should feel the arm of the law.

BY THE COURT,

The judgment was affirmed.

## Smith v. Blake.

In the Court below,

ELI SMITH, *Plaintiff*; REUEL BLAKE, *Defendant*.

An action on the case will not lie in favor of the creditor of a person who is insolvent, against a third person, charging him with having fraudulently taken and claimed the property of the insolvent, as his own, to defraud the creditors.

THIS was an action on the case, stating, that *Stephen Ranney* was indebted to the plaintiff, to a certain amount, by two promissory notes ; that a short time before the same became due, he was the owner of considerable property, as oxen, cows, &c. and had the improvement of a forge, &c. more than sufficient to pay said demand ; that being in debt, and embarrassed, he proposed to the defendant to assist him in concealing his property, from his creditors ; that the defendant, to effect this purpose, pretended to hire himself to said *Ranney*,

and soon afterwards claimed, that *Ranney* was greatly indebted to him for services, &c. and took an assignment of all *Ranney's* visible property ; that the defendant ostensibly appeared to be the owner thereof, by using it, &c. and, till within a short time, had always affirmed to the plaintiff, and the world, that the property came into his hands, in a legal manner, and in good faith, and that he was a large creditor to *Ranney*, and knew no means of satisfying his debt ; and that the plaintiff was thereby induced to suffer his claim to remain dormant, and had never been able to secure the same. The declaration then averred, that *Ranney* was never indebted to the defendant, and was, in fact, the owner of all the property, which apparently belonged to the defendant ; that the defendant, for his labor, was secretly paid out of the avails of the iron business, &c. and that *Ranney* was entitled to the residue of the avails, though the same were secreted by the defendant. And the defendant, designing to injure the plaintiff, in pursuance of his combination with *Ranney* to cover and conceal his property from his creditors, held the same under false colours ; and in September last, actually levied upon said property, in his own name, as being the property of *Ranney*, though then it was actually in his own possession ; by means whereof the plaintiff has been prevented from collecting his debts, and lost the same, *Ranney* being a bankrupt, and wholly unable to pay. Writ dated March 13th, 1801.

The defendant pleaded the general issue, and a verdict was found for the plaintiff.

On a motion in arrest, for the insufficiency of the declaration, the Superior Court adjudged the same to be insufficient.

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*Ingersoll*, and *Smith*, (of Litchfield) for the plaintiff in error.

This declaration states, that the plaintiff was a creditor of *Ranney* ; that the defendant combined with *Ranney* to cheat him out of his debt ; that he received *Ranney's* property, and affirmed that it was his own, and thus prevented the plaintiff from securing himself ; that the same was false and fraudulent, and designed to injure the plaintiff ; and that, in consequence thereof, the plaintiff actually lost his debt. Had the plaintiff levied upon this property as *Ranney's*, he could have held it ; if, therefore, the defendant affirmed facts to exist, which did not exist, and the plaintiff has been deceived thereby, the case compares with *Pasley v. Freeman*. (a) It makes no difference whether he told a lie in terms, or held out false colours. If a person dresses out a poor man as a gentleman ; goes with him where they are not known ; gives him a title, &c. though he says, when enquired of respecting the circumstances of the man, that he does not know what they are ; still he will be liable, if such person gain credit, in consequence of such appearances. So, if one secrete a bankrupt, and tell an officer, that he knows nothing about him, the Superior Court have decided, that such person shall be liable.

Had the plaintiff gone with his writ, and been prevented from serving it, by this affirmation of the defendant, an action would have lain. And it is no objection, that many persons might bring suits, if he had been the instrument of defrauding many ;—though, perhaps, the Court would say, that the first should hold to the amount of the property concealed.

(a) 3 Term Rep. 51.

The statute respecting fraudulent conveyances (b) may be cited against us; but from that statute we contend, that this action may be maintained, because the *plaintiff is aggrieved*. The statute, indeed, speaks of a *qui-tam* process; and such an one doubtless might have been brought, had it been commenced in time. But if a statute gives a penalty, may not an action at common law lie for the same offence, where the penalty has been waived? Where a bond, with penalty, was taken by a master, to secure the stay of his servant, it was held, that an action would not lie against the person enticing him away, *after* the bond had been collected; (c) but it seemed to be admitted, that had not the bond been collected, it would have been sustained. Here, the remedy upon the statute has not been pursued; the *party aggrieved*, therefore, may have an action at common law.

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*Gould*, for the defendant.

The present action is as novel in principle, as destitute of precedent. Fraud without damage, or damage without fraud, does not constitute a ground of action.

The plaintiff states that he had a claim against *Ranney*; and the defendant fraudulently accepted the property of *Ranney*. But does the plaintiff state, or could he know, that if this had not been done, he should have been the first to attach this property, or that there was sufficient of it to satisfy all the creditors? The plaintiff had no lien upon the property; it remained the property of *Ranney*. But, it is said, it was done with a fraudulent intent; but the damage to the plaintiff is no greater, than if there had been no such intent.

(b) Stat. 217

(c) 3 Burr. 1345, *Bird v. Randall*.

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No *right* of the plaintiff's has been affected. There was only a chance that he might have a right. Suppose C. is a creditor of A.—and B. cheats A. out of his estate ; can C. recover of B. because by his conduct C. has lost his debt ? Or, suppose that C. is about to conclude an advantageous bargain with A.—and B. knowing of it, to defraud C. destroys the property, which C. was to receive ; can C. maintain an action, having no right to the property ? Let the fraud be as great as can be imagined, C. having no right to the property, can have no right of action.

But the plaintiff has not even stated, that he should have attached this property as *Ranney's*. In *Pasley v. Freeman*, there was not only the grossest fraud stated, but, also *great damage*.

Again, it is not stated, in this declaration, that the property was concealed. The plaintiff might, therefore, have attached it. The averment, that he was prevented, &c. is merely an inference from the facts before stated. Neither is any rule of damages stated. The defendant is equally liable to all the creditors of *Ranney*, and may be subjected to a thousand fold more than the amount of the property received. *Civil actions* will, in this way, be made the instruments of *vindictive justice*. And, by the same rule, the creditors of *Ranney's* creditors may maintain an action against the defendant. The principle contended for by the plaintiff opens a door to litigation, without end.

Our statute against fraudulent conveyances has provided a remedy ; and part of the penalty is given to the party aggrieved, and part to the public. After this, he surely is not to be liable to all the creditors. The stat-

ute of Elizabeth, of which ours is a transcript, has existed about 250 years, and was in affirmance of the common law. Many fraudulent conveyances have doubtless been made since, in Great-Britain; but never was an action of this kind brought into Westminster-Hall.

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BY THE COURT,

The judgment was affirmed.

# Lewis v. Martin.

In the Court below,

HENRY MARTIN and MARY his wife, *Plaintiffs*; JOHN LEWIS, *Defendant*.

THIS was an action of account, brought, in the County of Windham, upon the statute relative to auditors and actions of account, stating, that *Mary Martin*, one of the defendants, and *Henry Martin*, in right of his said wife, were seized and possessed of two thirds of an undivided tract of land in the *Town of Union*, in the *County of Tolland*; and the defendant was seized of the other undivided third part of said land, as tenant in common with the plaintiffs, and the defendant had cut and carried away trees from said land, and refused to account with the plaintiffs for two thirds of the profits, or any part thereof, &c. The plaintiffs were described as of Woodstock, in *Windham County*, and the defendant as of Ellington, in *Tolland County*.

Husband and wife may join in an action of account, for rents and profits, of the wife's lands, arising during the coverture.

And such action may be brought in the county where the plaintiffs live, although the land lies in another county.

To this action there was a plea in abatement :

1. That the action was brought for facts alleged to have been done in the County of Tolland, concerning

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which the title of land *may be*, and *is*, in question, whereof the Court of Common Pleas in *Tolland County* have *original* and *exclusive* jurisdiction.

2. That the action ought to have been brought in the name of *Henry Martin only*, for rents and profits of the wife's land, during *the coverture*.

This plea in abatement was adjudged to be insufficient; and after judgment upon the merits against *Lewis*, he brought a writ of error, and assigned for cause of error, that said plea in abatement ought to have been adjudged sufficient.

*Peters*, for the plaintiff in error.

1. The action should have been brought in the County of Tolland, as the title of land *may be*, and *is*, in question. The statute is "that all suits brought for the trial of the title of land, or wherein the title of land is concerned, shall be tried in the same county where the land lies, or facts are done, concerning which the title of land *may be* in question." (a)

In actions of ejectment, the title is not necessarily involved; but the words of the statute are conclusive, as to cases where the title of land *may be* in question.

2. The rent of the wife's land during coverture is vested in the husband, and upon his death, goes to his representatives. (b) The account must, therefore, be rendered to him, and not to the wife. As the right of action

(a) Stat. 26.

(b) 2 Root 369, *Chauncey v. Strong*. 4 Term Rep. 616, *Ankerstein v. Clarke*.



would not survive to the wife, she may not join in the suit. (e)

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*Backus*, (of Pomfret) for the defendant in error.

The statute applies only to those cases, where the title of land is *definitely* in question,—where it is to be *settled*. In actions of *assumpsit* for rent, it *may* be in question. Here, there is no plea of title; nothing appears upon the record, to show that the title is in question; nothing but a statement of the party, that it may be, and is, in question.

2. To show, that the wife may be joined in the suit he cited, *Aleberry v. Walby*, (d) *Bidgood v. Way*, (e) *Esp. Dig.* 127, (f) *Brashford v. Buckingham*, (g) *Prat v. Taylor*, (h) and *Trigmiell v. Reeve*. (i)

BY THE COURT,

The judgment was affirmed.

(c) 1 *Salk.* 114, *Buckley v. Collier*.

(d) 1 *Str.* 229.

(e) 2 *Bla. Rep.* 1239.

(f) *Dub. Edit.* 1794.

(g) *Cro. Jac.* 77.

(h) *Cro. Eliz.* 61.

(i) *Cro. Car.* 438.

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## Fairchild v. Beach.

In the Court below,

JOHN FAIRCHILD, *Plaintiff*; JOHN BEACH, DANIEL BURR, jun. CYRUS BURR, DAVID BURR, and CYRENUS HARD, *Defendants*.

A person interested in the question on trial, but not in the event of the suit, may be a witness.

THIS was an action on the case, stating, that the defendants proposed to sell to the plaintiff, and *Elias Glover*, and others, a quantity of land, in the County of Russell, in the State of Virginia; and it was afterwards agreed, that part of the land should be taken in the County of Shanhaway. The defendants affirmed to the plaintiff, that *Beach* had a good title to the land, and that the same was of a good quality. Several persons combined, and entered into an agreement, with the defendants to become purchasers, merely as decoys, to induce the plaintiff and others to purchase. The patents were to be procured from the governor of Virginia, and were, in fact, procured, and delivered to the plaintiff and others. Nevertheless, *Beach* had no title; the land was of a bad quality; and the plaintiff was injured, and defrauded, &c.

A special plea was given to part of this declaration, and the general issue to the remainder. The jury found a verdict for the defendants, upon both issues.

On the trial, *Elias Glover*, one of the real purchasers, was offered by the plaintiff, as a witness, he having commenced a suit, and recovered judgment against part of the defendants for the same fraud, as stated in the present declaration, but upon different pleadings. The defendants objected to his evidence, on the ground, that he was interested in the question; for should they

prevail in this case, they might, and would, bring a petition for a new trial, in that. The Court refused to admit him as a witness. To this opinion a bill of exceptions was filed. (a)

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*Smith*, (of Woodbury) for the plaintiff in error.

*Elias Glover*, a purchaser of some of this land, who had brought a suit and recovered, and, consequently, was no longer interested, was excluded from testifying. And the reason assigned was, the other party might bring a petition for a new trial. So long as the case was *pending* there might have existed an interest ; but when it was decided, there could be none. It is always in the power of a party to say, that he may, and shall, bring suits against a witness, whom he wishes to exclude. But it would be no ground for a new trial, in the case of *Glover*, that the defendants had succeeded in this case,

But, admitting that *Glover* was interested ; still he ought not to have been excluded. The Superior Court have, indeed, determined, that interest in the question shall prevent a person from testifying. But that point has never been determined by this Court. The question was much agitated in England, and contradictory decisions were had ; but it was finally *settled*, in the case of *Bent v. Baker*, (b) that those only who are interested in the *event* of the suit, shall be inadmissible. This rule has since been uniformly adhered to, in the courts of Westminster, (c) and is the rule in the courts of the United States.

(a) There were several other exceptions taken ; but these are omitted, and the arguments upon them, as the judgment of the Court was founded wholly on this point.

(b) 3 Term Rep. 27.

(c) 7 Term Rep. 60.

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*Edwards*, (of New-Haven) and *Daggett*, for the defendants in error.

*Glover's* action has been tried ; another similar to it, depending upon the same facts, is now on trial. Had not *Glover's* case been tried, he could not have been a witness, though he had brought no action.

It is said, that an interest in the question will not exclude a witness in Great-Britain. The rule there is, if the witness is to be *ultimately benefited* by the decision, he is not admissible ; or if he claims in the same right as the party on trial, he cannot be admitted. (d) In the commentary of *Espinasse* upon the case of *Bent v. Baker*, (e) the principal reason given for the exclusion of the witness is, that he should not be permitted, by *making himself interested*, to deprive the party of his testimony. Here, the witness claims under the same deed, as the plaintiff ; no case can be stronger as to his interest.

But, it is said, *Glover* has obtained a judgment. Suppose three persons claim to have been defrauded, and bring three separate actions, and have no evidence but the testimony of each other. The first case is lost, because there is no evidence to support it. Then, upon the principle contended for, that man becomes a witness for the others ; and when *they* have obtained their causes, by *his testimony*, the *first* may, upon a petition for a new trial, support *his case*, by *their testimony*. The Court will never say, that one claiming on account of a fraud done him, shall recover, and another shall not. Such inconsistency would disgrace a court of justice. The Court would, therefore, grant a new trial ; and *Eli-*

(d) *Esp. Dig.* 706.(e) *Id.* 714.

as *Glover* must be considered as standing on the same ground, as he did, before his case was tried.

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*Smith*, in reply to the cases cited from *Espinasse's Digest*, remarked, that they were all decided anterior to *Bent v. Baker*.

The judgment of the Superior Court was reversed. There being another case (*f*) decided by the Court, at this term, upon the same principle, the reasons, which were equally applicable to both, were subjoined to the latter.

(*f*) *Phelps v. Winchel*, *infra*.

## Phelps v. Winchel.

In the Court below,

SIMEON WINCHEL, *Plaintiff*; OLIVER PHELPS, and ELKANAH PHELPS, *Defendants*.

THIS was an action on the case, stating, that the defendants had combined with *Ephraim Pixley*, *Ebenezer Center*, and *Elkanah Phelps*, jun. for the purpose of defrauding the plaintiff, and had, by means of such combination, practised a fraud on the plaintiff, in the pretended sale to him of certain lands in that part of Pennsylvania commonly called the Susquehannah Company's Purchase.

A person interested in the question on trial, but not in the event of the suit, may be a witness.

*Oliver Phelps*, one of the defendants having died, during the pendency of the suit, the other defendant pleaded the general issue, which was closed to the jury. A verdict was found, and judgment rendered, for the plaintiff.

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On the trial, the defendant offered said *Elkanah Phelps*, jun. as a witness in the cause generally, to disprove the facts alleged by the plaintiff in the declaration. The plaintiff objected to his being sworn, on the ground, that he had aided in the fraud complained of ; that he had practised similar frauds on other persons, for which he was liable to suits ; and that he held notes against several persons, which had been obtained by such fraudulent sales. The Court rejected the witness, and the defendant filed his bill of exceptions, on which the case was brought before this Court.

*Smith*, (of Woodbury) was of counsel for the plaintiffs in error ; and *Daggett* and *Gould* were of counsel for the defendant.

The question in this case being the same as in that of *Fairchild v. Beach*, it was submitted without argument.

The judgment was reversed.

BY THE COURT. The common law recognizes but one description of interest, that shall exclude a person from testifying ; that is an interest in the event of the suit. Merely an interest *in the question*, as it is called, —his having, or being likely to have, a suit, which may turn upon the same point, is not, in legal estimation, an interest. It is a *bias*, affecting his credit, but not his competency. So is the law understood, by the courts at Westminster. Precedents to the contrary, which misled them for a time, as they have the courts in this State, have been found, on examination, to be departures from the law. It was never, indeed, admitted, in principle, that bias, without interest, went to the competency of a

witness ; nor could it be, without rendering the rule of admission too uncertain for practice, and too limited for the investigation of truth. The error, that crept into practice, was, that of mistaking, in certain cases, bias for interest.

- In this case, the witness offered was neither to gain, nor lose, by the event of the suit. The verdict, which his testimony might have affected, could never have been given in evidence for, or against him. He ought, therefore, to have been sworn, notwithstanding his supposed bias, and his credit left to the jury, with such observations, as the Court might think proper to make, to assist them in estimating it correctly.

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## Humphry v. Humphry.

In the Court below,

ABRAHAM HUMPHRY, *Plaintiff*; MARY HUMPHRY, *Defendant*.

**T**HIS was an action of ejectment. The general issue was pleaded, and a verdict was found, and judgment rendered, for the defendant.

On the trial, the plaintiff gave in evidence a deed of the land in question from *Samuel Humphry* to himself, and his heirs, forever, dated the 18th of December, 1801.\* To prove her title to retain possession, the defendant offered in evidence a deed of the same land from *Samuel Humphry*, dated the 7th of May, 1801 ; by which, said *Samuel*, for the consideration of love, &c. gave to his three daughters, *Lois*, *Eunice*, and *Harriet*, and their heirs, &c.

A deed of land by A. to B. C. and D. in fee, reserving the use of the premises during the life of the wife of A. for her benefit, on certain conditions, shall not, as to such reservation, be defeated, by a subsequent conveyance made by A.

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forever, this land, *retaining and reserving the use and improvement thereof, during the term of the natural life of his wife, Mary Humphry.* She was to take the benefit of this reserve, *on condition*, she should perform the duties of a kind parent, *in providing for, and educating the said Eunice, and Harriet*, who were minors, *till they should respectively, come to the age of twenty one years*, and pay a certain sum, when they should be married or become of age. The rest of the deed was in the usual form. It was agreed, that the two daughters, *Eunice*, and *Harriet*, were yet minors, and unmarried ; and that said *Mary* had been, and continued to be, providing for, and educating them. The plaintiff objected to the admission of this deed, because, at the time of making and delivering it, the said *Mary* was the wife of said *Samuel*, though she had since been lawfully divorced ; and, therefore, had not taken, and could not take, any title, by virtue thereof.

The deed was admitted in evidence, and a bill of exceptions filed.

*Smith*, (of Woodbury) and *Gould*, in support of the judgment, contended, that the rule of construing a deed ought to be such, that the general and particular intent may both stand ; if both cannot, the general intent ought to be regarded.

The object of the grantor, in this case, was to provide for his family, as he had it in contemplation to leave them. But, it is said, the reservation was to himself ; if that was his meaning, he surely would have said so. The deed, though inartificially drawn, gives an absolute estate to the daughters ; and a reservation for the wife was clearly designed, provided she performed the conditions.



And let it be noticed, the reservation, be it for whom it may, is not to take effect, unless the conditions be performed. The reservation, being by the husband to the wife, is void, and a mere nullity ; the children, therefore, take as though there had been no reservation. It may be said, the reservation is to the husband, as trustee to the wife ; but the husband cannot, in such case, be trustee for the wife.

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As the plaintiff claims under a deed from *Samuel Humphry* to him, and his heirs, forever ; we may show, that *Samuel Humphry* had nothing to convey,—or has conveyed nothing. Even if the *use* enured to him, he has attempted to convey an estate *in fee*, and has, therefore, forfeited his interest. The reason of this rule is not strictly feudal, as such conveyances tend to injure and expose the remainder-man.

Besides, the objections to this evidence amount only to this, that it is insufficient ; it is not irrelevant, it points directly to the issue, and the jury are to determine its sufficiency.

*Ingersoll*, in reply, admitted, that a grant, by tenant for life, of a greater interest than he possesses, is, in England, a *forfeiture* ; a forfeiture not to him in remainder, but to the lord. This rule of law is founded upon feudal principles, which our Superior Court have often determined were not to be recognized here. But a man may, by our common law, and agreeably to common sense, grant the interest, which he has, by a deed, in which he attempts to convey more.

What was the interest of *Samuel Humphry*, in this case, is to be collected from the *deed only*. He could

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not make a reservation to his wife ; and if he could, he has not used those apt words, which are necessary ; for he says, “ I retain and reserve the use and improvement of this estate, during the life of my wife *Mary*.” By this he must have meant, I retain and reserve it *to myself* ; nor are we bound to show why the time fixed upon was during the life of his wife. But further, he says, “ said *Mary* is to take the benefit of it, on condition she educate the children,” &c. I retain it, but if she perform the condition, she shall have the benefit of it. That engagement to the wife being void, the reservation, then, enures to himself. It is like a covenant by A. to stand seized to the use of himself for life, remainder to his daughters ; in that case, A. is to have the use of it, during his life. Here, the grantor reserves to himself the use, as clearly as he gives the remainder to his daughters ; it is to vest in them, when he has done with it. This, then, is the conveyance of a freehold estate, to commence *in futuro*, which, by the decisions of this Court, as well as of those of Great Britain, is not to be allowed.

BY THE COURT,

The judgment was affirmed.

## Brace v. Catlin.

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In the Court below,

NATHANIEL BRACE, *Plaintiff*; ABIJAH CATLIN, *Defendant*.

**T**HIS was an action of *indebitatus assumpsit*, in which the plaintiff declared, that he had conveyed to the defendant, at his request, a certain piece of land, and the defendant, in consideration thereof, promised to pay the plaintiff as much money, as said land was reasonably worth.

Plea *non assumpsit*; issue to the jury; and verdict for the defendant.

On the trial, the plaintiff read in evidence his deed of said land to the defendant, dated the 11th of November, 1798, which contained an acknowledgment, in the usual form, that the consideration of 200*l.* had been received by the plaintiff, for said land, to his full satisfaction. The defendant then offered in evidence a certain writing, executed by the plaintiff, in these words:

*Harwinton, May 15th, 1789.*

"This day, received of *Abijah Catlin* five pounds lawful money, in full satisfaction of all debts, dues, and demands, whatever. As witness my hand,

"*Nathaniel Brace.*"

To the admission of which the plaintiff objected, on the ground, that it purported to be a *discharge* from the plaintiff, whereby the defendant was acquitted from the plaintiff's demand. The Court overruled the objection,

A writing in these words "Received of A. B. 5*l.* in full satisfaction of all demands," is a *discharge* within the meaning of the statute regulating pleas, and cannot be admitted, under the general issue, as evidence of the payment of 5*l.* of the debt or duty, for which the action is brought.

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and permitted the writing to be read in evidence, not as a discharge, but as evidence of payment of five pounds. The plaintiff then offered certain evidence, (a) which was objected to by the defendant, and rejected by the Court. A bill of exceptions was filed by the plaintiff, for the admission of the former evidence, and the rejection of the latter, on which the case was brought before this Court.

*Smith*, (of Woodbury) and *Gould*, for the plaintiff, contended, that the writing, which the Superior Court suffered to be given in evidence, under the general issue, was a discharge, and ought, if the party would have availed himself of it, to have been pleaded specially. (b) It makes no difference with what *view* the Court admitted this instrument. In whatever light they might consider it, its nature was the same. The only question, therefore, is, what was its legal operation? If the force and effect of it was a discharge, it ought not to have been admitted. The operative words were "in full of all demands." It is usual to insert a certain sum, that it may appear to have been given for value received; but the amount of that sum does not affect the operation of the instrument. This writing exactly answered the description of the statute; it extinguished every claim, which, at the time, existed; it was an act of the plaintiff, by which the defendant was saved from the plaintiff's demand. If it had been pleaded specially, and demurred to, would it not have been a *bar*?

*Ingersoll*, and *Daggett*, for the defendant, contended,

(a) The principal questions, which were made by the counsel in argument, regarded this evidence; but as the case was decided by the Court, upon the other point solely, a particular statement is omitted.

(b) *Stat.* 349.

that as this action was upon the implied promise, a discharge might be given in evidence under the issue of *non assumpsit*.

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The judgment was reversed.

BY THE COURT. The statute regulating pleas excepts from matters, which may be given in evidence under the general issue, *a discharge from the plaintiff, his accord, and every other special matter, whereby the defendant, by the act of the plaintiff, is saved or acquitted from the plaintiff's demand.*

It is manifest from the tenor of this instrument, that it was intended to be a *bar* to all suits, of whatever nature, which the plaintiff might bring against the defendant, for cause of action prior to its date. It is this understanding of it only, that gives meaning and effect to the terms "in full satisfaction of *all* debts, dues, and demands, whatever." But, although it extends and applies equally to every suit, that might be brought, it cannot be evidence, in every suit, that 5% of the original debt or duty declared upon has been paid. It cannot, therefore, be such evidence, in any particular suit. Nor could it be intended as evidence, in any case, that any definite portion of the 5% had been paid on the original debt or duty, in such case; for no definite portion of it is either expressed, or ascertainable with reference to any case.

The instrument is evidence of an accord, with satisfaction, that 5% was accepted, *in lieu* of any right of action against the defendant, which the plaintiff had. It is so to be taken, both because it has the customary form used in such cases, in this State, and because it cannot, as we

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If barely the circumstance, that an instrument contains evidence of the payment of a sum of money, renders it admissible under the general issue, the statute will be defeated ; for almost every discharge or acquittance under the hand of the party contains such evidence. The payment, however, in such cases, as in the present case, is not the payment or performance of the original debt or duty, but of what the party receiving has accorded to accept, *in lieu thereof* ; and it is the accord only, a fact not enquirable into under the general issue, that gives relevancy to the payment.

## Davis v. Salisbury.

In the Court below,

STEPHEN REED, PETER FARNHAM, and LOTT NORTON, select men of the Town of Salisbury, *Plaintiffs* ;  
SHELDON DAVIS, *Defendant*.

A justice of peace, living in the town interested, may, upon complaint of selectmen, founded on the statute of bastardy, recognize the accused to the County Court. On such complaint the mother need not be examined, in the time of travail, and may be compelled to testify.

THIS was a complaint, by the select men of the Town of Salisbury, for and in behalf of said Town, upon the statute concerning bastardy, stating, that *Abigail Knapp* of Salisbury was pregnant with a child, which, when born, would be a bastard ; that she was poor and needy, and said child *was likely to become expensive and chargeable to said Town*, &c. By virtue of a warrant, founded upon this complaint, *Davis* was arrested, and brought before *Joshua Porter*, Esq. of Salisbury. To this complaint and process *Davis* pleaded in abatement, that the said *Abigail* did not make oath, that he was the fath-

er of the child, *previous* to the issuing of the warrant ; that the justice was an *inhabitant of the Town of Salisbury*, and incapable of trying said complaint ; that said *Abigail* was a *married woman*, and unable to make and substantiate the complaint ; and, that the complaint was insufficient. The justice decided, that the plea in abatement was insufficient, and that the complaint was sufficient. *Davis* then pleaded *not guilty*, and was recognized to appear at the County Court. The County Court found the plea in abatement insufficient, and a supplemental bill was then filed, stating, that the child was born. The defendant pleaded in bar, that said *Abigail* had not been constant in accusing him of being the father, for that she did not accuse or charge him in the time of her travail.

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To this plea there was a demurrer, and it was adjudged insufficient. The Court then, after due enquiry, found the defendant guilty, and made an order, that he find bonds, &c. Said *Abigail* was offered as a witness, to testify who was the father of the child. She was objected to, on the ground that she was a married woman, although it was agreed, that she had not lived with, nor seen, her husband, for eight years. The Court decided, that she was obliged by law to testify, and ordered her committed, until she should testify, who the father of the child was.

A writ of error was brought to the Superior Court, and the causes assigned were :

1. That said plea in abatement was adjudged sufficient.
2. That said *Abigail* was compelled to testify who the

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father of the child was, she being a married woman, and not a party to said process.

3. That the plea in bar was adjudged sufficient.

4. That said Court, on said plea in bar, gave judgment that *Davis was guilty*, and that he find bonds, &c.

The judgment was affirmed in the Superior Court, and a writ of error brought to this Court, to obtain a reversal of that judgment.

*Sterling*, and *Gould*, for the plaintiff in error.

1. The justice was not, in this case, a competent judge. Inhabitants of communities, who are parties to a suit, are not competent witnesses, except from necessity. In *Hindson v. Kersey*, (a) a case illustrious in the law, it was held, by Lord CAMDEN, that a parishioner could not be a witness to a will, from which the parish was to receive an advantage. A judge ought to be removed from all suspicion of interest. But justice *Porter* sat in *his own case*; and had the same interest, as though the suit had been for money. A prosecution for pound-breach, or rescue, is not a *civil* action; and the proceedings, therefore, are not authorized by our statute giving penalties to town treasuries. *There*, the prosecution is in the name of the State, upon a *qui-tam* complaint; *here*, the remedy asked for is for the benefit of the Town, and prayed for in behalf of the Town. This is purely a *civil* cause. The defendant is not prosecuted for an *offence*, nor considered as a *delinquent*; but the suit is merely to secure the Town from an illegitimate child.

(a) Ante 11.



If the defendant gives the security, nothing further can be done. That the rest of the inhabitants of Salisbury are interested, as well as the justice, is no more a reason why the justice should try the action, than it is that A. should try a case, in which he is interested, because B. and C. are likewise interested.

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It is said, a magistrate of a town may try a suit brought by a pauper of that town. But, in that case, no interest, which the law recognizes, exists.

A judgment of a justice of East-Haven, upon a bye-law of that Town, by which one half the penalty went to the Town, was unanimously reversed by the Superior Court. (b)

It is said, that in this case, the justice did not decide the merits of the case. But sufficient for us is it, that he did *judicially* decide a question, in which *he was a party*. And if the justice could not do this, the County Court had no legal jurisdiction;—the case was never before them.

2. This complaint is insufficient; because it does not appear, that the woman is an inhabitant of the Town of Salisbury, and if not an inhabitant, that Town is not bound to support the child, (c) and consequently has no claim upon the reputed father. In the complaint, she is described as of the Town of Salisbury, but no more is implied by this, than that *she dwells* in that Town.

3. She was not put to the discovery of the truth, in the

(b) *Ives v. East-Haven, M. S.*

(c) 1 *Rect* 155, *Canaan v. Salisbury*.

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time of her travail. The statute is intended as a guard to *the man*, as well as the woman; and, therefore, provides, that he shall be subjected, if she continue "constant in her accusation, being examined upon oath, and "put to the discovery of the truth, during the time of her "travail." (*d*) But a difference is attempted to be made between prosecutions brought by the select men, and by the woman herself. Every argument, however, used in the one case, is applicable to the other. The select men are authorized to pursue a suit commenced by the mother. Are they not, then, authorized to support it, by the same evidence?

4. The mother should not have been compelled to testify, to criminate herself; by her own testimony, to convict herself of adultery, and bastardise her issue. It is said to be unreasonable, that the Town should be deprived of her testimony. The idea of collusion between the parents is not sufficient to authorize a court to dispense with the rules of law. A party may often lose his evidence, and must bear it as his own misfortune. Thus, if an Insurance Company require a certificate of select men as the only proof of loss, if the select men will not give such certificate, the party cannot recover.

5. As to the judgment, it is remarkable, that the Court should have found the defendant *guilty*, when the question as to his guilt was not made. But they have not found, that the mother was examined. This was determined by the Superior Court, in *Penfield v. Norton*, (*e*) to be necessary. There, the Court went upon the ground, that as the statute evidence was necessary, it must appear that that evidence existed.

(*d*) Stat. 54

(*e*) 1 Root 345

## SUPREME COURT OF ERRORS.

*Strong, and Smith, (of Woodbury) for the defendants*  
in error.

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1. The interest of the justice was a minute one ; such an interest as would not have prevented his being a witness. The justice is interested in every prosecution for sabbath-breaking, pound-breach, and pound-rescue. But the interest is so minute, that it comes within the maxim, *de minimis lex non curat*. This, however, was not an action in the name of the Town to *recover money* ; but merely to *obtain security*, against a remote contingency. Were a town pauper to bring a suit before a justice of the Town where such pauper is settled, though the justice would have an interest, yet he could try the cause. But, in this case, the justice was not to adjudge upon the merits of the case ; his act was merely a ministerial one, to hand up the record to a higher court.

2. It is said, that the complaint is insufficient, because it does not state, that the mother would not prosecute. But it is stated, that the child is likely to *become chargeable*. Were it otherwise, the plaintiff would not be bound to negate every fact, which might constitute a ground of defence. In declaring on a note, he need not state, that it is not usurious, was not obtained by duress, &c. The mother is said to be *of Salisbury*, and the child likely to *become chargeable to Salisbury*.

3. It is objected, that the woman was not examined, in the time of her travail. In a suit brought by the woman herself, it is admitted, that this is necessary. When a person is to recover a premium for her own iniquity, and to support it by her own testimony, too strong guards can hardly be placed around that testimony. It ought not to depend upon the uncorroborated oath of

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the party. But, in a prosecution by the select men, the woman is disinterested ; at least, she has no pecuniary interest. The same guards were not necessary, and were not imposed. This part of our statute is similar to the English statute, and is to be construed like that. By that statute, the woman is not to be examined, during the time of her travail. If such examination were necessary, that part of the statute, which authorizes select men to prosecute, would be a dead letter ; for the woman would never accuse the father, after a compromise had been made with her ; and no law would compel her, *at that time*, to disclose.

4. It is objected, that *Abigail Knapp* was a married woman. This does not appear from the complaint. The complaint states, that the child would be a bastard. The plea in abatement states, that the mother was a married woman ; but this does not negate the statement in the complaint, that the child, when born, would be a bastard. It appears, that she has not seen, nor lived with her husband, since the year 1791 ; it cannot, therefore, be pretended, that the husband had access. The old doctrine, that the wife cannot have a bastard, while the husband is within the four seas, is exploded. (f) The mother was likewise a proper witness, upon the enquiry who the father was, though not as to the point of access. The authority given by the statute to a town to proceed, will justify the Court in admitting the only evidence, which can be expected, as to the fact. But though the Court made an order, that she should testify, it no where appears, that it was executed, or that she did testify.

5. Again, it is objected, that the judgment is bad, be-

cause it has found the defendant *guilty*. But he has confessed his guilt, by his plea in bar ; besides, he must be found guilty, before the Court can make an order. These prosecutions are so far of a criminal nature, that the Court always find the facts. The finding is, therefore, correct. If it were not, it would be merely surplusage. But the plea of *not guilty*, was before the Court ; it appears upon the record ; and it was proper for the Court to answer it.

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The Court, it is true, have not stated, that the woman was examined. They are not obliged to detail the evidence, which was exhibited.

Perhaps too, it is not necessary, in a prosecution by select men, that the mother should be examined, if the fact can otherwise be made out ; for she may have absconded.

BY THE COURT,

The judgment was affirmed.

## Deming v. Taylor.

In the Court below,

JULIUS DEMING, and JOSEPH LYMAN, executors of *Lynde Lord*, Esq. *Plaintiffs*; DAVID TAYLOR, *Defendant*.

THIS was an action on the case, stating, that *Taylor* brought his action against *Lord*, as sheriff, declaring that one *Gunn* was committed to gaol, upon an execution in favor of *Taylor*, and that *Lord* suffered *Gunn*, freely and voluntarily to go at large, and escape from prison, against the will of *Taylor*. *Lord* pleaded, and the Court

An action on the case, for expenses incurred, in defending against a groundless suit, cannot be maintained by the executor of such defendant.

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found, that *Taylor* consented, that *Gunn* should depart from prison; and judgment was rendered for *Lord*. The plaintiffs alleged, that *Taylor* secretly, and unknown to *Lord*, permitted, and procured *Gunn* to leave the prison, to compel *Lord* to pay the debt; and *Lord*, in employing counsel, and procuring evidence, necessarily expended a large sum, above the costs he recovered.

To this declaration, the defendant, in the County Court, pleaded in abatement, that he had not been benefited, nor the assets of *Lord* injured, by said wrong, for the expences of the suit were borne by one *Reuben Webster*, and the right of action died with *Lord*. The plaintiffs traversed that the expences of the suit were borne by *Webster*;—to which there was a demurrer. The County Court rendered judgment that the replication was sufficient. That judgment was reversed in the Superior Court.

*Gould*, for the plaintiffs in error.

The statute *de bonis asportatis* has been construed liberally. It has been construed to extend to administrators, as well as executors; to goods converted, as well as to goods carried away. An executor may maintain an action of ejectment for a chattel real, or a suit against a sheriff, for a false return, or for an escape, although the escape happened in the life of the testator. (a) So he may maintain trover for goods converted in the life of the testator; (b) so for trespass upon property. (c)

The common law maxim, that *actio personalis moritur*

(a) 4 Mod. 403, *Williams v. Carey*. 1 Salk. 12. s. c. Pop. 189, *Lemasons and Dickson's case*. 4 Term Rep. 280, *Cockerill v. Kynaston*.

(b) Esp. Dig. 572.

(c) *Griswold v. Brown*, ante 180.

*cum personá*, is not even generally true, says Lord Mansfield, in the celebrated case of *Hambly v. Trott*. (d) Because an action for such an injury would not lie *against* an executor of a person deceased, it does not follow, that an action will not lie *in favor* of an executor. In the one case, the only question is, has the assets of the deceased been benefited; in the other, has the property of the deceased been injured? And whether the injury was done, during the life of the testator, or not, is of no importance, so that the suit be against the original wrong doer, not against his executor. The maxim, as applied to an executor plaintiff, is confined to injuries done to the *person* of the testator, as assaults, imprisonment, slander, adultery, &c. (e)

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In this case, have not the assets of sheriff *Lord* been injured? We complain only of the injury to his property. His personal liberty and security were not violated. We do not complain of the injury as vexatious merely, but as having *occasioned expence*; and expence has been considered as a good ground of action. (f)

*Daggett*, and *Sterling*, for the defendant in error.

The rule of the common law, that personal actions die with the person, is admitted. The question now is as to the applicability of that rule, or as to the *gist* of an action for a malicious prosecution. The gist of such an action may be determined by the statement required in the declaration. It is necessary to state something besides a loss of property. The ground may be merely the

(d) *Comp.* 374.

(e) 3 *Bl. Com.* 302. *Comp.* 372.

(f) *Esp. Dig.* 529. 1 *Salk.* 13, *Saville v. Roberts*. 1 *Sera.* 691, *Jones v. Gwynne*. *Stiles* 373. 10 *Mod.* 148.

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danger of imprisonment ; and the plaintiff may recover, though he has not paid a cent. As in actions of slander, the Court will presume damage, so in this action expence will be presumed. It is no justification in an action for a malicious prosecution, that the plaintiff had paid nothing, or that his reputation or person was not injured. But the Court would say, that it was, *per se*, evidence of damage, and the expence might be taken into consideration to encrease the damages.

Because Justice *Blackstone* remarks, that actions for slander, false imprisonment, &c. do not survive to the executor, it does not follow, that all others do survive. These are mentioned only by way of example.

The injury here, if any, was merely to the person, and the expence is consequential to that injury. The action cannot, therefore, survive.

The cases cited by the Counsel for the plaintiff, are cases, where the *person of the testator* is not effected, but only the *property*, as for escape, &c. In *Griswold v. Brown*, the action regarded property only, and a rule of damages was given. There, too, the deceased recovered judgment before his death, and the case in this Court was upon a petition for a new trial. The right of executors extends only to property. If they had omitted to bring this suit, they would not have been liable on their bond. They can recover only where a specific rule of damages is given, not where the jury may give vindictive damages ; for it is unjust, that they, who are accountable only for the personal property, should recover more than the damage done to that property.

In such cases, our legislature have allowed threefold



the damage sustained ; and can the court sever these damages, and say, part is given for the injury done to the person, and part for the injury to the property ? Wherever the damages are presumptive, the action dies with the person. Wherever the *gravamen* is an injury to the person, the action dies with that person. If a declaration would have been good without stating the expence incurred, the stating of that expence cannot vary the nature of the action. Besides, in this declaration, neither malice, nor want of probable cause is stated, which must always be stated in suits of this kind.

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*Gould* in reply. The action for malicious prosecution may be brought for an injury to the reputation, to personal security, or personal liberty, or for expence only. The *gist* of the action is compounded of the wrong, and the subsequent injury. The gist of this action is the *expence*. In actions for slander of title, and for words not actionable in themselves, there must be a *per quod*, shewing how the party has been injured. There, the *gravamen* comes under the *per quod*. Here, the fraudulent design, followed by the expence, is the ground of action.

It is said, that the cases cited are those where property only is concerned. Such, it is contended, is this case.

It is objected, that vindictive damages may be given. But such damages can no more be given in this case, than in an action of trover, or an action for fraud, where damages may be given to the amount of the property.

*Gristwold v. Brown* is said to be a petition for a new trial. But after that petition was granted, the case was again tried on the merits.

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It is objected, that no malice is alleged. But any improper or wicked motives are considered malicious in our law ; and improper motives are surely alleged in this declaration.

It is said, want of probable cause is not alleged. That is necessary in actions for malicious prosecutions, but not in those founded on civil suits. In actions for maliciously holding to bail, or for suing before a court, which had no jurisdiction, it would be ridiculous, as well as nugatory, to say, that the party had no probable cause.

In this case, the declaration would not be good, without the *per quod*, stating the injury to the property.

BY THE COURT,

The judgment was affirmed.

### Denslow v. Moore.

In the Court below,

HANNAH MOORE, *Appellant* ; REUBEN DENSLOW, *Appellee*.

A writ of error is brought against A. B. C. and D. in which C. and D. are described as of Southamton in Massachusetts ; A. and B. plead in abatement, that no ser-

vice has been made upon C. and D. alleging that C. and D. are of Windsor in this State, and traversing their being of Southamton in Massachusetts ; this plea is bad, the fact traversed being an immaterial one.

AN appeal was taken from the Court of Probate, approving the will of *Kezia Barber*, and the judgment of the Court of Probate disaffirmed by the Superior Court. In the writ of error to this Court, the heirs at law were made defendants. *Benjamin Moore, Philander Moore, Simeon Moore, Eldad B. Moore, Timothy Cooke, Hannah Cooke, Edward Phelps, Azubah Phelps, Lucinda Mather,*

and *Arthur Griswold*, were described as belonging to this State ; *Levi Griswold*, *Avery Griswold*, *Laura Griswold*, *Homer Griswold*, *Wealthy Griswold*, *Charles Griswold*, and *Abel T. Griswold*, were described, as was also *Abel Griswold*, said to be their father, and natural guardian, as late of Windsor, in this State, now of Southampton, in the County of Hampshire, and State of Massachusetts. The writ was duly served upon those within the State, and also upon *Abel Griswold*, the guardian. *Benjamin Moore*, *Philander Moore*, *Simeon Moore*, *Eldad B. Moore*, *Edward Phelps*, *Azubah Phelps*, *Lucinda Mather*, and *Arthur Griswold*, pleaded in abatement, that the writ of error had not been served upon said *Levi*, *Avery*, *Laura*, *Homer*, *Wealthy*, *Charles*, and *Abel T.* and that, said *Levi* and *Abel T.* belonged to, and resided in Windsor, in this State, traversing their being of Southampton, in Massachusetts.

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To the first exception in the plea there was a general demurrer ; to the second, a special demurrer, first, because it was not pleadable, by the persons who pleaded it ; secondly, because the traverse was immaterial, offering to put in issue facts not alleged, and not denying, that said *Levi* and *Abel T.* lived out of this State.

*Bradley*, for the plaintiff in error.

There are, in the plea, two distinct causes of abatement, and they ought not to be joined. These persons living out of the State, and not being parties to the original suit, service upon them there would have had no effect, and they not having any attorney here, no other service could have been made. They have traversed, that two of the defendants live in Southampton ; but this was immaterial. At common law, it is not necess-

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ary to describe the county ; and where a defendant lives in another State, it is not necessary to describe the town. The traverse offered, extending only to the town, and not to the State, is, therefore, immaterial, and we were not bound to accept it ; for if these persons do not belong to Connecticut, it is of no consequence whether they are of Southampton, or of any other town. It does not appear, except by the inducement to the traverse, that they were not served with process ; and we are not bound to traverse the inducement. (a)

Further, those defendants, upon whom legal service has been made, cannot take advantage of a want of service upon other persons. (b)

*Edwards*, (of New-Haven) and *Sargeant*, for the defendants in error.

Our statute directs, that in all civil actions, twelve days notice shall be given. By permitting a writ of error to be amended, it has been decided to be an action. This service must be made upon the *defendants*,—all the defendants, except where it is otherwise expressly provided. Service upon the guardian, is not service upon the minors. There is no practice to justify it, and no statute authorizing it. If, upon such notice, the guardian should fail to appear, a judgment against the minors would be of no validity. Had not the minors been included, the writ would have abated ; and they were included for no purpose, but that they should be notified. The service is required by positive statute. It is, therefore, no good reason to say, that service could not be made.

(a) 1 *Str.* 494, *Colborne v. Stockdale*.

(b) 1 *Root* 407, *Kipple v. Coleman*. 1 *Bac. Abr.* 9. tit. *Misnomer*.

The statute has provided for cases of joint contract, where one defendant lives out of the State. So where all the defendants live out of the State, and have property within it. In this case, no such provision is made. Upon petitions in chancery, where one respondent lives out of the State, the Superior Court have made a rule, that a copy of the petition &c. shall be sent him. The petitions of insolvent debtors are not granted, by the General Assembly, without the usual service, unless a special resolve be made as to notice.

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But, it is said, that we have traversed an immaterial fact. If so, they need not join issue, but may have another traverse. Our traverse is as broad as the plaintiff's allegation. He has said, that a part of the defendants belong to Southampton, in Massachusetts. We say, they belong to Windsor in Connecticut, and not to Southampton in Massachusetts. Had we said more, it would have been a departure.

*Perkins*, (of Hartford) in reply.

If the argument of the defendant is good, no writ of error can be brought, where a part of the defendants live out of the State. This case is within the reason, if not within the letter, of suits upon joint contracts, where one defendant is out of the State. In such a case as this, service upon an attorney of the party is good, although no statute authorizes it, and even although his power is revoked, after the former judgment, and before service of the writ of error is made. In this case, the guardian has been duly notified, and no other service could be made.

The second exception taken in abatement is bad, because it is not taken by the persons, who have a right to

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take it. Persons duly notified cannot say, *other persons* have not been duly notified. The traverse is immaterial. The authorities all show, that the real point, *the substance* of what is meant to be put in issue, must be noticed, and not the mere words. (c) The substance of the allegation is, that A. and B. live in *Massachusetts*. Upon this, a traverse should have been offered; but they, pursuing the words, deny that A. and B. live in *Southampton*, in *Massachusetts*. They ought to have denied their living out of *Connecticut*; that would prevent service from a court in *Connecticut*; and the effect would be the same whether the town in which they lived, was rightly described, or not. But now the Court must find, whether these defendants live in *Southampton*, or not, which is wholly immaterial.

THE COURT, decided the plea in abatement to be insufficient, on the ground of informality; but directed the case to be continued, and made a rule prescribing notice to the minors. (d)

The plaintiff in error, afterwards suffered a nonsuit.

(c) *Cro. Car. 501, Nevison v. Whitley.*

(d) A general rule was also passed, prescribing the notice to be given in all cases, in which service is not prescribed by law, which see subjoined to the decisions of this term.

## Lockwood v. Lockwood.

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In the Court below,

GIDEON LOCKWOOD, and JOHN LOCKWOOD, *Petitioners* ;  
ALBERT LOCKWOOD, *Respondent*.

THE petition stated, that *John Lockwood*, on the 4th of May, 1764, mortgaged to *Nathaniel Marston*, for the sum of 100*l*. New-York currency, payable in one year, 20 acres of land ; and on the 13th of February, 1784, said *John*, by his will, devised to his wife the use and improvement of all his estate, real and personal, for her life, with power to sell, if she should have need of more than the use, remainder to his children, of whom the petitioners were two. The wife of the testator died on the 15th of January, 1801, not having disposed of said right of redemption. No distribution of the estate of said *John* was ever made among his devisees and legatees. In the year 1786, *Thaddeus Bennet* levied an execution upon the interest in the equity of redemption of *Michael Lockwood*, one of the devisees, and conveyed the same to the petitioners. *Marston* died in October, 1778, and devised the mortgaged land to his executor, who, on the 12th of December, 1798, conveyed the same to *Albert Lockwood*, the respondent. The prayer of the petition was, that the respondent should account, and that the petitioner might redeem. Petition dated the 9th of July, 1802.

A. devises a mortgaged estate to B. for life, with power to sell, remainder to C. — fifteen years undisturbed possession, by the mortgagee, during the life of B. will preclude a redemption by C.

The respondent, in his answer, admitted the mortgage to *Marston*, the will of *John Lockwood*, and the conveyance to himself, and denied the levy of *Bennet's* execution. He also stated, that *Marston* recovered judgment, in an action of disseizin, in November, 1767,

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against *John Lockwood*; and that this estate had not been inventoried as *John Lockwood's*, though a final settlement had been made of his estate; that on the 16th of June, 1785, the respondent went into possession of the premises, under a lease from *Marston*, and continued in possession as aforesaid, till December, 1788, and then purchased the same, and had ever since been in possession. He also averred, that the mortgage money had not been paid. The Court found the facts above selected from the answer to be true, and sufficient, and the facts in the petition, not traversed in the answer, to be true, and decreed, that the petitioners take nothing by their petition.

*Edwards*, (of New-Haven) and *R. M. Sherman*, for the plaintiffs in error.

Though *Albert Lockwood* has been in possession of this land more than fifteen years, yet the rule adopted, in analogy to the statute of limitations, does not apply to this case. Here, the wife had the use of this estate during her life, with *power to sell it*. *Albert*, therefore, cannot have gained a title by possession, against the petitioners; as they could not claim by a legal right, or have a legal process to enforce their claim.

The petitioners had only a contingent remainder, or an executory devise. The statute, to which this rule is analogous, is intended to operate only in those cases, where the party can make his entry, or "sue out to effect his right or title." (a)

Even were the remainder vested, the tenant in re-

(a) Stat. 254.



mainder would not be barred. But here, the petitioners had no interest, during the life of the widow ;—it was a mere possibility, not devisable, nor transferable, and not such an interest, as it has often been determined, as would give a person a right to redeem.

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If we admit this to be a contingent remainder, still, as it is not a vested interest, we have been guilty of no latches. It is like the case of an estate given to one, after he arrives to 21 years of age. Were this a vested remainder the devisees might redeem, but would not be obliged to redeem, during the life of the tenant for life ; for by redeeming, they could not obtain the present enjoyment of the property, and the tenant for life could redeem out of their hands.

It has been suggested, that the remainder must vest somewhere, and that the estate, which was not in the widow, must be in the *heirs* of *John Lockwood*. But, if an interest did vest by descent, in the heirs of *John Lockwood*, this would not prevent them from redeeming, except so far as they received property by descent.

If the widow is disseized of the estate set out to her as dower, for fifteen years, the heirs will not be barred, by her neglecting to recover her dower. Suppose she had been endowed of this mortgaged estate, as by the decisions of the Superior Court she might have been, had there been no will, and the mortgagee had ejected her, after which she had lived fifteen years, would this have prevented the heirs from redeeming ? Surely, the devisees are not to be placed in a worse situation than the heirs.

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*Ingersoll, and Daggett, for the defendant in error.*

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This Court, in the case of *Smith v. Skinner*, (b) decided, that a rule similar to the statute of limitations was to be adopted in chancery. The Superior Court had adopted the same principle. (c) Where more than fifteen years have elapsed, and there has been no acknowledgment of the mortgagee, nor any act of his evincing the estate to be a mortgage, and the mortgagor cannot show himself to be within the exceptions allowed by the courts of chancery in Great-Britain, no redemption can be had. In 1764, this land was mortgaged; nothing more is heard of it till 1784, when it is claimed to have been devised. In 1785, the respondent went into possession under a lease from *Marston*; in 1787, he purchased it of *Marston*, and received a conveyance, claiming it as his own. It is not pretended, that he claimed as heir to *John Lockwood*. He stands, then, on the same ground, that *Marston* himself would have stood on; and the petitioners, not having been minors, or femmes covert, or beyond seas, could not have redeemed against *Marston*. The statute of limitations having begun to run, always continued to run.

But it is said, that it was so devised by *John Lockwood*, that they could not get into possession. Were this so, it could not vary the rights of *Marston*, or his assignees. But was there no person who had a right to redeem? This is not pretended. The widow might have redeemed, and our claim is not to be varied by her neglect.

(b) Ante 124.

(c) 1 Root 485, *Crittendon v. Brainerd*.

But the petitioners themselves had power to redeem, during this time. Their interest was not a bare possibility, or even a contingent remainder, but a fee vested in them, liable, however, to be defeated, for the support of the widow.

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BY THE COURT,

The judgment was affirmed.

## Bishop v. Selleck.

In the Court below,

JACOB BISHOP, HENRY WEED, and MARY his wife, in her right, DEODATE WEED, and SARAH his wife, in her right, MOSES MATHER, 2d, and SALLY his wife, in her right, EBENEZER BISHOP, ABRAHAM HAWLEY, ISAAC HAWLEY, CHARLES SELLECK, RHENA BISHOP, LAVINA BISHOP, ISAAC BISHOP, ABRAHAM BISHOP, and HANNAH BISHOP, *Plaintiffs*; JESSE SELLECK, *Defendant*.

**T**HIS was an action of ejectment, for sixteen acres of land in Stamford.

The defendant made a special plea, in which the whole case was fully stated, and admitted, on the part of the plaintiffs, by a demurrer. On the 9th of May, 1757, John Bates made his will, by which, after giving to his two eldest sons a small tract of land, he devised to his other sons, and to his daughters, of whom Sarah Selleck was one, the rest of his estate, real and personal, to be divided among them in certain specified proportions. He then made provision for the payment of his daughters' proportions out of his personal estate, so far as it

A devise of lands to A. for life, remainder to her heirs, and their assigns, forever, vests a fee-simple in A.

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should be sufficient, and directed, that what should be wanting should be made up to them out of his real estate, which the sons should have four years to redeem. The following clause was then subjoined: "But what land shall be set out to my daughter, *Sarah Selleck*, to make her half so good as one of her brethren, shall not be redeemed, but shall be to her heirs, and their assigns, forever, and I give only the use of it to her, during her natural life." The testator died before June 5th, 1759, and on the 11th of April, 1760, the demanded premises were distributed to *Sarah Selleck* under the will. From *Sarah Selleck* the defendant deduced his title, by a regular chain of conveyances. The plaintiffs claimed title as heirs at law of *Sarah Selleck*. The question in the case was, whether *Sarah Selleck*, under the will, took a fee-simple, or a life estate? (a) The Superior Court decided, that she took a fee-simple, and adjudged the defendant's plea sufficient.

*Edwards*, (of New-Haven) for the plaintiffs, contended, that by the word "*heirs*," in the devise, was not meant the whole inheritable blood of *Sarah Selleck*, but her children, and was, therefore, *descriptio personarum*.

*Daggett*, and *R. M. Sherman*, for the defendant, contended, that the rule in *Shelly's* case (b) is the true rule, viz. that where a freehold estate is given to a person, and, in the same instrument, is limited to his heirs, the heirs take by descent, and not by purchase. In support of this doctrine, they cited *Bowles' case*, (c) *Wright v.*

(a) There was another question made, viz. whether *Sarah Selleck* did not get the estate by a deed? That question depended upon this, whether a freehold estate could commence in future? It was the opinion of the S. C. E. that it could not.

(b) 1 Co. 104.

(c) 11 Co. 79.

*Pearson*, (d) *Hargrave's Law Tracts*, 501, *Dean v. Gillot*, (e) *Bale v. Coleman*, (f) *Bagshaw v. Spencer*, (g) *Butterfield v. Butterfield*, (h) *Garth v. Baldwin*, (i) *Colson v. Colson*, (j) and *Hayes v. Foorde*. (k)

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BY THE COURT,

The judgment was affirmed.

(d) Cited in *Jones v. Morgan*, and reported in a note, 1 *Brown's Ch. Ca.* 212.

(e) 2 *Term Rep.* 451.(f) 1 *P. Wms.* 142.(g) 1 *Ves.* 142.(h) 1 *Ves.* 154.(i) 2 *Ves.* 646.(j) 2 *Atk.* 246.(k) 2 *Bla. Rep.* 698.

## Webb v. Danforth.

In the Court below,

EDWARD DANFORTH, *Plaintiff*; WILLIAM WEBB, RICHARD PRICE, and FREDERICK ROBBINS, *Defendants*.

THIS was an action of trover, stating, that the plaintiff was, on the 1st of August, 1801, possessed of the one undivided half of a vessel, and her appurtenances, the other half of which was owned by the defendants, as tenants in common with the plaintiff. On the 26th of said August, the plaintiff lost the same, which came into the defendants' hands by finding, and they neglected and refused to deliver it, though demanded. On the 22d of October, and on the first of November, 1801, the defendants converted and disposed of the said half of the vessel to their own use, &c.

An action of trover cannot be sustained by one tenant in common, against his co-tenant, unless the property be destroyed. A party to an instrument may be a witness to facts, subsequent to the execution thereof, which tend to invalidate it.

Upon trial of this cause to the jury, on the general issue, the plaintiff claimed by virtue of a bill of sale,

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signed by *Kinne & Park*, dated the 11th of April, 1801; and the defendants, by sundry bills of sale from *Kinne & Park*, subsequent thereto. The defendants contended; that they had no knowledge of the sale to *Danforth*; and offered *Kinne*, as a witness, to prove, that subsequent to the execution and delivery of the bill of sale to the plaintiff, and before the sales to the defendants, the plaintiff agreed with *Kinne & Park*, that they should keep possession of the vessel, after it should be finished, that it should be registered in their names, that they should sell it, as their own, and that, in the mean time, the bill of sale to the plaintiff should be kept secret; and that, in pursuance thereof, the plaintiff did keep said bill of sale secret, and that the vessel was registered in the names of *Kinne & Park*, and of the defendants. The plaintiff objected to the admission of *Kinne* as a witness, on the ground, that his testimony went to invalidate his own bill of sale. The Court excluded the witness; and a bill of exceptions was filed.

*Williams*, (of Hartford) for the plaintiffs in error.

1. This action cannot be sustained. Trover will not lie, by one tenant in common of personal property, against another tenant in common; and the reason is obvious,—the possession of one is the possession of both. Upon this subject, the authorities are too explicit to be doubted, and too numerous to be denied. So says the text of *Littleton*; so say the comments of *Coke*; (a) and Lord MANSFIELD says, “there is no *dictum* to the contrary. The reason,” he adds, “is unanswerable; “there can be no conversion.” (b) One joint owner of personal property could hardly be punished for stealing

(a) *Co. Litt.* 199. 1 *Salk.* 290, *Brown v. Hedges*.

(b) *Corpus*. 450, *Fox v. Hanbury*.

that property. No more can he be answerable for converting it. In a late case, (c) it has been decided, that such an action would not lie, though a stranger was likewise made a defendant.

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2. *Kinne* ought to have been admitted to testify, even if his testimony went to invalidate an instrument executed by him. In *Title v. Grevet*, (d) a person, who had conveyed land, was admitted to prove, that he had no title. Witnesses to wills have been repeatedly admitted to deny the sanity of the testator. (e) And so far has this principle been extended, that in *Wright v. Littler*, (f) the death-bed confessions of a witness to a forged instrument, were admitted as evidence. Lord MANSFIELD, indeed, in *Walton v. Shelly*, (g) speaks of a *rule established*, that a man may not invalidate an instrument, to which his name is affixed, as a party, or a witness; but we surely have a right to ask, when, and by whom, this rule was established; or in what case it was recognized, prior to that of *Walton v. Shelly*? If one pleads usury, fraud, duress, or illegal consideration to a note, or bond, may not the witnesses be called upon to support such plea? Are they bound always to conceal the truth, because they put their names to an instrument, which did not disclose it? The rule of the civil law, *ne-mo allegans suam turpitudinem est audiendus*, is cited in the case of *Walton v. Shelly*. But, if you are to take your rules of evidence from the civil law, let it be remembered, that, by that law, father and son cannot be witnesses for each other; neither can those, who are

(c) 1 Term Rep. 658, *Holliday v. Gamseil*.

(d) 2 Lord Raym. 1008.

(e) 1 Bla. Rep. 365, *Love v. Joliffe*. 4 Bur. 2225, *Geordie v. Clayton*.

(f) 3 Bur. 1248.

(g) 1 Term Rep. 296.

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related to persons interested ; nor can any fact be established, by the mouth of a single witness. (h) In *Rich v. Topping*, (i) Lord KENYON said, there had been different opinions about the case of *Walton v. Shelly*, and seemed at least to *doubt* it himself ; and, in *Adams v. Lingood*, (j) declared his opinion to be opposed to it. In *Jordaine v. Lashbrook*, (k) the case of *Walton v. Shelly* was overruled, by the Court of King's Bench.

But, if this rule is established, it is founded upon the paper currency of Great-Britain, and ought not to be extended farther than to negotiable instruments. The reason given, that third persons will be affected, applies, if not exclusively, yet certainly more strongly, to such instruments. Justice BULLER, the champion of the rule established in the case of *Walton v. Shelly*, agrees, in *Bent v. Baker*, (l) with Lord KENYON, that the rule extends to negotiable instruments only. And in conformity to their opinions have the courts in Pennsylvania decided. (m)

Objections to witnesses have lately been directed rather to their credit, than to their competency, both by the courts of Great-Britain, and our own courts. Were the rule as contended for by the defendant in error, it would only be necessary to get the names of those acquainted with the facts, on the instrument, and all evidence of its illegality would be excluded.

But, in this case, the witness was not called to *impeach his own deed*, but to show a fact, independent of

(h) 1 *Domat*. 449.(i) 1 *Esp. Rep.* 176.(j) *Peak's Ca.* 117.(k) 7 *Term Rep.* 601.(l) 3 *Term. Rep.* 34, 6.(m) *Dallas* 196, *Pleasants v. Pemberton*.



it, which, with the *subsequent* conduct of the party, would render the deed, not void, but of no use. The facts, to prove which the witness was called, would not have rendered the deed, originally void ; indeed, they are expressly stated to have been *subsequent* to the execution of the bill of sale, and, therefore, do not interfere even with the rule established in *Walton v. Shelly*. In *Charrington v. Milner*, (n) in a suit by an indorsee against the maker of a note, Lord KENYON admitted the indorser to prove, that the note *had been paid*, as such evidence would not prove it to have been *originally void*.

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*Edwards*, (of New-Haven) and *Daggett*, for the defendant in error, admitted, that one tenant in common could not have an action against his fellow tenant, while the property was in existence. But that question could have been made only while the case was on trial to the jury. Where the possession is a tortious one, the principle does not apply ; and if the property be destroyed, by one tenant in common, the other may have an action. (o) So, in case of real property, a tenancy in common may be destroyed, by the act of one of the parties. (p) In trover for a ship, Lord KING left it for the jury to say, whether the ship was not destroyed. (q) Had we brought trespass, the common allegations, that the defendant carried away, and the plaintiff lost, this property, would have been sufficient ; and where trespass *vi et armis* will lie, trover will also lie.

From this declaration it appears, that the plaintiff and defendants were tenants in common of this property, in August, 1801 ; that it was converted by the defendants

(n) *Peake's Ca.* 6.

(o) *Esp. Dig.* 586. *Dub. ed. Co. Litt.* 200.

(p) *Comp.* 217, *Det v. Fisher*.

(q) *Sul. N. P.* 34.

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in November, 1801; here is nothing inconsistent with the supposition, that the property has been destroyed. The jury could not have found the conversion, without having found such facts as constitute a conversion. If the Court, therefore, think the destruction of the property the only evidence of a conversion, they will presume the jury have found it. It cannot be necessary to state in the declaration, that the property is destroyed. This declaration is drawn precisely according to the English forms.

The case of *Fox v. Hanbury* only shows, that one partner cannot maintain trover against another.

2. The witness was properly rejected, on the ground of interest. He was called upon to swear, that *Kinne & Park* were to dispose of a vessel, which they had already sold. No stronger case of interest can be put.

The case of *Title v. Grevet* is not law, in Great-Britain, any more than in Connecticut. A man is never permitted to contradict his own covenant; it is always an estoppel. But it does not appear, in that case, that the party warranted the land; he might only have released it.

The cases of *Lowe v. Joliffe*, and *Goodtitle v. Clayton* are cases of witnesses to wills; and it is singular, that Lord KENYON should say, those cases compared with the cases where the signers of notes and deeds are called as witnesses. In the one class of cases, they attest merely to the sanity of the party; in the other, they become parties.

In *Abrahams v. Bum*, (r) Lord MANSFIELD recogni-

zes the rule for which we contend ; and in *Walton v. Shelly* he speaks of it as A SETTLED PRINCIPLE OF LAW. ASHURST, J. in a late case, says, it is yet law.

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In *Jordaine v. Lashbrook*, the question arose under the revenue laws ; and, in such cases, it is to be expected, that judges will lean as far as is consistent with integrity. The reasoning of Lord KENYON, in that case, however, is remarkable rather for its *pathos*, than its *soundness* ; for, if the name of a person is procured to be placed upon a writing to prevent his being a witness, he will not be disqualified. In England, four judges of the King's Bench have concurred in the rule adopted in *Walton v. Shelly*, and but three have opposed it. (s) That rule was recognized, by this Court, in *Allen v. Holkins*, (t) and several of the judges expressed an opinion, that *Walton v. Shelly* was good law.

But an attempt is made to distinguish this case from that, by saying that *Kinne* was called to prove facts subsequent to the making of the deed. But these facts go directly to show, that the deed was originally fraudulent. They must have been designed so to operate, or the plaintiffs in error must have expected to defeat our title by parol.

*Terry*, (of Hartford) for the plaintiffs in error, in reply.

1. The general doctrine is, that one tenant in common cannot maintain trover against his co-tenant ; and there is no exception to this rule. The reason is, that the use of the thing held in common, by one of the owners, is

(s) 1 *Esp. Rep.* 298.(t) *Ante* 17.

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not an injury, for which any action will lie; for, by the tenure, they have an equal right to the use. If the property be destroyed, an action will lie, but not trover. BULLER, (u) indeed, speaks of the case of *Barnardiston v. Chapman* as an action of trover; but *Espinasse* does not call it trover. If it was trover, it must have contained some allegation, that the property was destroyed.

It is said, the Court are to presume, that the jury have found the facts. It is admitted, that they must have found the *facts stated* to be fully proved; but from the facts stated in this declaration, it does not follow, that the property was destroyed, but merely that the defendants used it as their own.

It is said, that it does not appear from this declaration, that the plaintiff and defendants were tenants in common. It is alleged, that they were tenants in common, on the 1st of August; that the property was lost on the 26th, and then found by the defendants, and converted, on the 1st of November. They must, therefore, at the time of the conversion, have been tenants in common.

2. The question of *Kinne's interest* is not before the Court, and the Counsel had no right to argue from it. He was objected to, and excluded, upon another point. The party must be considered as having waived this objection; for we cannot now shew, as we might have shewn, had it been made at the trial, how that interest was destroyed.

But admitting his interest in the case, it was equally strong on both sides. He had given a mortgage to *Danforth*, and a bill of sale to *Webb*, &c. If he estab-

(u) *Bul. N. P.* 35.

lished the second bill of sale, he remained debtor to *Danforth* to the amount of the first, for which *Danforth* had his note. His interest, therefore, was exactly balanced.

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The only question, then, is, whether he could not prove the facts, lest it should invalidate his own security?

In Great-Britain, this question, is settled, beyond all controversy; and BULLER, J. in the case of *Bent v. Baker*, admitted, that what he then considered as the rule could not be extended, except to *negotiable instruments*. This Court, it must be admitted, in *Allen v. Holkins*, held a contrary opinion. *Holkins* claimed under a lease, and *Allen* under a deed, from *Mumford*; *Mumford* was offered as a witness, to prove the lease a fraudulent one, and was excluded. The civil law rule was adopted, that a party to an instrument, shall not be admitted, to prove that instrument to have *been originally void*.

But, in this case, it is stated, that at a time *subsequent* to the bill of sale to *Danforth*, the agreement between *Kinne* and *Danforth*, which we wished to prove, was entered into. This admits the bill of sale to be good, to pass the property from *Kinne* to *Danforth*, but goes to show, not that the bill of sale was originally void, or that the debt was destroyed, but merely that it should not operate as against those persons. Nor was the witness offered to prove *any turpitude* in himself, but merely to show, that the transaction between him and *Danforth* was such, that the claim of *Danforth* should be postponed to ours.

Suppose A. conveys to B. and B. to C.—B. sues C.

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for the property ; may not A. be a witness ? Or suppose A. buys a watch of B. and leaves it with him to sell, and he sells it to C. and A. brings trover for it ; may not B. be a witness ? Lord MANSFIELD's opinion, in *Levi v. Essex* (v) seems to decide this. In the case read from *Peake*, the principle for which we contend is expressly recognized. There, the evidence went to prevent the recovery upon the note, not to prove it originally void. Here, the evidence was to show, that the bill of sale should have no effect in this case, not that it was originally void.

The judgment was reversed.

BY THE COURT. It appears by the bill of exceptions, that the defendants claimed, that *Danforth*, the vendee of the vessel, at a time subsequent to his purchase, constituted *Kinne & Park*, the vendors, from whom he derived his title, his agents, or factors, to sell and dispose of the vessel, and left the same in their possession, for that purpose. Such was the agreement, which the defendants claim was entered into. Proof that such agreement was made, or that such *authority* was *given*, and *executed*, though derived from the original vendor, does not impugn the title derived from the vendor. It only shews, that the title so derived has *been divested*, by his subsequent consent, through the medium of his agent, or factor. The facts disclosed exhibit the witness as acting, in the first instance, in his own behalf, as the owner and seller of an article, and transferring a right or title to his purchaser ; and, afterwards, as acting, by the subsequent appointment of the purchaser, as his agent, authorized to transfer the same article, and, by virtue of

his agency, to divest the title originally derived from him. It is a known rule, that an agent or attorney may be sworn as a witness, to testify either for, or against, his principal. The testimony required was of this species. Nor is the rule varied, from the circumstance, that the witness offered has conveyed the article in question to one of the parties. Neither the agreement alleged, nor the acts claimed to have been done, by *Kinne & Park*, in pursuance of the agreement, went to invalidate the title derived from them. The objection to *Kinne* as a witness should not, therefore, have been allowed. It is on this ground, that the judgment of the Superior Court is reversed.

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The second point (*iv*) may have been urged on the issue to the jury. It does not, however, appear by the record, to have come under the consideration of the Superior Court. It is a general rule, that one tenant in common cannot maintain trover against his co-tenant. It is, however, contended, that there are exceptions to this rule. This question does not appear to have received the decision of the Superior Court, to which this cause is remanded for further proceedings; and it is, of course, needless, that this Court express any opinion on that point.

(*iv*) This was the first point made in the argument.

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## Goodwin v. Sheldon.

In the Court below,

RODERICK SHELDON, *Plaintiff*; ANNA GOODWIN, *Defendant*.

A decree of Probate ordering a sale of lands, with a return of sales, and an account giving credit for the lands sold, furnish no legal evidence, that an *inventory* had been previously made and exhibited.

Counsel have no right to argue to the jury, that these documents furnish such evidence.

THIS was an action of ejectment, for fifty eight acres of land in Colebrook, part of the estate of *Daniel Sheldon*, deceased,

The general issue was pleaded, and closed to the jury. On the trial, the plaintiff claimed title to one seventh part of the premises, as heir at law of *Daniel Sheldon*, and to five other seventh parts, under deeds of conveyance from his other heirs. The defendant claimed as purchaser from *Nathaniel Skinner*, who bought of *Isaac Sheldon*, the administrator of said *Daniel*. To prove her title, the defendant exhibited in evidence the following decree of Probate :

“ At a Court of Probate, holden at Hartford, within  
“ and for the District of Hartford, on the 22d day of  
“ February, 1805.

“ Whereas the estate of Capt. *Daniel Sheldon*, late of  
“ Hartford, deceased, hath been represented insolvent ;  
“ and it appearing from the report of commissioners,  
“ and from the amount of expenditures in settling said  
“ estate, to be insolvent : This Court doth empower and  
“ direct Mr. *Isaac Sheldon*, Administrator, to sell the  
“ whole of said estate, both real and personal, at public  
“ vendue, for the benefit of the creditors, and make re-  
“ turn to this Court, to whom said estate is sold, and  
“ for how much, with an amount of the charges of  
“ sale.”



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The defendant also produced the administrator's deed to *Skinner*, made in pursuance of a sale of the premises at public vendue; also, a record of the Court of Probate of a return of sales, in which was included an account of the sale of the premises to *Skinner*; also the administrator's account of administration, by which it appeared, that said estate was insolvent, and in which was included a credit of the sale of the premises. The plaintiff's counsel argued to the jury, that the defendant's evidence of title was incomplete, because *no inventory* of said estate had been shewn. The defendant's counsel, in their turn, were about to argue to the jury, that the above recited decree of Probate, together with the return of sales, and account of administration, was sufficient evidence, that an inventory had been made, and exhibited to the Court of Probate, before the decree was passed. The counsel for the plaintiff objected to the right of the defendant's counsel to argue to the jury, that such evidence was furnished by said records, on the ground, that if an inventory was ever made, it ought to be produced. The Court decided, that said decree, return, and account were not legal evidence, that an inventory had been made and exhibited, and stopped the defendant's counsel in the argument. To this decision a bill of exceptions was filed, on which the case came before this Court.

*Smith*, (of Woodbury) and *Gould*, for the plaintiff in error.

If an inventory was necessary to authorize the Judge of Probate to make the order of sales, that order is evidence, and conclusive evidence, that an inventory existed. The sentence or decree of any court of competent jurisdiction is conclusive, as to the right, which it

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imports to confer or establish ; (a) and, consequently, it is conclusive evidence, that all the previous steps, which were necessary and regular, have been taken. If the want of an inventory were such a defect as to deprive the court of its jurisdiction, and render the decree not merely irregular, but void, we admit that an inventory would not be implied by the decree. But the *death* of *Daniel Sheldon*, within this Probate District, immediately gave jurisdiction to the judge. His proceedings, therefore, were not void, and it is to be presumed, that they were regular.

It is much safer to oblige the heir to take advantage of any irregularity by appeal, than to shake the titles of purchasers, at a distant period of time.

*Daggett*, and *Dwight*, for the defendant in error, contended, that the administrator could not sell, but on an insolvency, and order of sale ; that this order could not be made, but on a view of the debts compared with the inventory ; that the land in question never appeared to have been inventoried ; and, of course, the judge had no power over it.

BY THE COURT,

The judgment was affirmed.

(a) 1 *Str.* 481, *Moody v. Thurston*. *Id.* *Rex v. Vincent*. 1 *Lex.* 235, *Noel v. Wells*. 1 *Str.* 703, *Rex v. Rhodes*. 3 *Term Rep.* 125. 122, *Allen v. Dundas*.

## Phelps v. Sill.

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In the Court below,

THOMAS SCHUYLER SILL, *Plaintiff*; NOAH PHELPS,  
Esq. *Defendant*.

**T**HIS was an action on the case, stating, that in July, 1789, the plaintiff was a minor of nine years of age, and had no parents living; that he resided in the Probate District of Simsbury, of which the defendant was judge, and was *the owner and legal possessor of \$2000 worth of personal estate*, which was well known to the defendant; that the plaintiff being incapable to elect a guardian, the defendant, on the 19th of July, 1789, did, as Judge of Probate for said District, appoint and constitute, *Earl Stanley* his guardian, who accepted the office; that the defendant caused all the property of the plaintiff, to be delivered into the hands of *Stanley*, to the amount of \$2000; that *Stanley*, when appointed, and long before, was a man of no property, and a notorious bankrupt, and that well known to the defendant, at the time of said appointment; that the defendant neglected and refused to take any security from said *Stanley*, for the faithful discharge of his office and duty as guardian; that *Stanley*, soon after the receipt of the defendant's property, squandered and spent the whole amount thereof, and absconded, and had resided in parts unknown to the plaintiff, and ever since had continued a bankrupt; and that the defendant had never called *Stanley* to any account of his guardianship, but had wholly neglected and refused to do the same.

An action will not lie against a Judge of Probate, for neglecting to take security from the guardian of an infant, although such infant had personal estate, and the guardian was a bankrupt.

The allegation that the plaintiff was owner, and legal possessor, of \$2000 worth of personal property, is not a sufficient description of that property.

Nor is the want of a more particular description, cured by verdict.

When the cause was on trial to the jury, on the general issue, the plaintiff offered *Stanley* as a witness, to show, that when he was appointed guardian, the defend-

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ant did not enquire of him what his property was, or whether he had any. This enquiry was objected to, because the defendant was then acting in a judicial capacity, and it was not proper to enquire into the evidence he had, or might have had, or upon which he acted. This enquiry was admitted as pertinent to the issue; and a bill of exceptions filed. After verdict for plaintiff, there was a motion in arrest for the insufficiency of the declaration; and the declaration was adjudged sufficient.

The errors assigned were,

1. That the declaration ought to have been adjudged insufficient.

2. That *Stanley* ought not to have been examined to prove the facts objected to.

*Daggett*, for the plaintiff in error.

1. There is not sufficient certainty in the description of the property. The allegation, that the defendant was possessed of \$ 2000 worth of personal property, is as general as possible. There is no instance, where one man may call upon another for damage to property, without describing that property. (a) And the reason assigned is, that the judgment may be pleaded in bar to another action. Lord MANSFIELD says, however, that the true reason is, that the defendant cannot justify, unless the particulars are specified. But we admit, that less certainty in the description of the property is now required in trover, and trespass, than formerly. (b)

(a) 7 Vin. Abr. 383, 4. 5 Co. 34, *Plater's case*. 1 Salk. 287, *Martin v. Hendrickson*. 1 Stra. 637, *Wrat v. Effington*. Cro. Eliz. 817, *Wood v. Smith*. 4 Bur. 2455, *Bertie v. Pickering*.

(b) 2 Stra. 738, *Radley v. Rudge*. Id. 809, *Bottomley v. Harrison*. Id. 827, *White v. Graham*.

It was as necessary, that *Phelps* should be informed of the nature of the property, as it would have been, that the guardian should have been informed, had the suit been against him. Such an allegation would not have been sufficient in a replication upon a probate bond. Even in book debt, the party must give oyer, and, after that, may not vary his claim. If an action were brought against an attorney, it would not be enough to say, that he had received \$ 2000 worth of notes, and squandered them ; nor would such a description answer, in a suit against an officer, for not levying upon goods tendered to him ; nor in a suit against a third person, for secreting goods from an officer.

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In this case, the plaintiff should have told what the property was ; or at least, whether it was contained in the inventory, at the Probate office. Had this been done, we might have proved, that the plaintiff never owned some part of it, and that he had received and destroyed another part.

2. There is not sufficient certainty, as to the neglect of duty charged. The allegation is "wholly neglecting, and refusing, to take any security." There is no allegation, that he neglected to take a *bond*, but merely that he did not take *security*. The bond of the guardian, even with *certain sureties*, would not be any *security*, as the case might be. This allegation, therefore, does not negate the idea of his taking the bond of the guardian. The term *security*, as used in the statute concerning replevins, (c) &c. does not mean *surety*, but *safety*. The term is used in the statute relating to attachments, (d) precisely in the same sense, as it is in the statute respect-

(c) Stat. 360.

(d) Stat. 24, 327.

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ing guardians ; and the Superior Court, under that statute, have always decided, that the bond of the plaintiff is sufficient security, where the plaintiff is responsible. The statute requiring the plaintiff to give bonds on taking out execution against an absent debtor, (e) speaks of a bond with *sureties*. The statute relating to appeals (f) adopts the same expression. So, special bail is to consist of *sufficient sureties*. The authority signing a writ of error, must take a *bonds with surety*. (g) The sheriff and the treasurer are to give *bond*, with *sureties*. (h) But in the statutes relating to attachments, appeals from Probate, and the old statute relating to guardians, a different language is used ; there *sufficient security* is to be given. (i) The allegation, that the judge has not taken sufficient security, is consistent with his having taken the bonds of the guardian himself ; and this he might have done, under the statute, which was in operation, when this transaction happened. The court will never enquire, whether the judge has made a mistake, as to the property of this man. The act of 1797, requiring a guardian to give bonds with *surety*, shows that *before*, surety was not required.

3. *Phelps* acted as a judge. As a judge he acted, in appointing *Stanley* ; as a judge, he delivered to him the property ; and throughout, he is treated as a judge. If so, no action can be sustained against him, unless he acted *maliciously and corruptly*. But, there is no intention to injure stated in this declaration. It is merely stated, that he *neglected and refused* (perhaps upon good grounds) to take *security*. Nothing, from which malice can be inferred, is stated.

(e) Stat. 25, 28.

(g) Stat. 162.

(i) Stat. 24, 167, 227.

(f) Stat. 39.

(h) Stat. 383, 421.

An action will not lie against a judge, for an erroneous judgment. Though he mistook, it is sufficient for him, that he acted *judicially*. (*j*)

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An action has been sustained against a justice, for refusing the oath to a party robbed. But that is a mere ministerial act; the justice has nothing to do with the complaint, and makes no record of his doings.

In all cases of this kind, where suits have been brought against officers, it seems to have been agreed, that it was necessary to state malice. (*k*)

Every Judge of Probate is to take sufficient security; but this is no more a part of his duty than the appointment of a guardian. And is he to be sued for appointing an improper guardian? In England, the Lord Chancellor may take property into his hands; and if he places it in the hands of a bankrupt, is he liable to the party in damages?

This is analogous to cases, where duties are imposed upon other courts. The County Courts are enjoined to continue a cause, where the defendant is out of the State, and not to issue execution till bonds are lodged; if execution is taken out, and no bonds are entered, are the Court liable? Will it be said, that the clerk takes the bond? His acts are the acts of the court. If, in that case, it be the act of the clerk, may it not, also, in this case, be the

(*j*) 1 Mod. 119, *Bushell's case*. 1 Mod. 184, *Hammond v. Howell*. 2 Mod. 218, *Hammond v. Howell*. 2 Ld. Ray. 767, *Lumley v. Quaree*. 1 Salk. 101. s. c. 1 Com. Dig. 241.

(*k*) 1 Term Rep. 493, *Sutton v. Johnson*. Gosw. 172, *Mostyn v. Fabrigas*. 1 East 555, *Hammer v. Tappenden*. 15 Vin. Abr. 15, 16, 18. 2 Lev. 116, *Barnardiston v. Some*.

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act of the clerk of Probate? The only difference in the cases is, that in one case, there are five judges, and in the other, but one. A variety of cases before the Superior, County, and City Courts may be put, where the judges must be liable, if the judge, in this case, is liable.

But a judge cannot be responsible to a party injured in damages, unless he acts *corruptly*; a judge of admiralty is frequently required to take bonds; the governor and council are, in some cases, to take bonds; and will it be contended, that they are liable, if those bonds are insufficient?

Will it be said, the defendant neglected to call this guardian to account? In this case, no damage had arisen, because they have alleged, that the guardian was, and ever has been, a bankrupt. But were it otherwise, will our judges subscribe to this doctrine, that any persons, affected by the *delay of a court*, in the settlement of an estate, can have an action against the judge? Upon the same principle, the Court of Common Pleas may be made liable to damages, for continuing a case too long.

*Smith*, (of Woodbury) and *Sterling*, for the defendant.

1. It is objected to this action, that the property is not sufficiently described. We admit, that anciently great strictness was required in the description of the property, in actions of trover and trespass, because in those actions, the property may, by the judgment, be vested in the defendant. Besides, in trover, the gist of the action is the conversion, and the value of the property need not be stated. It is, therefore, necessary, that the description of the property be more particular, to give a rule of damages, and that it may be a bar to another action,



And yet, in those cases, greater latitude is now allowed. (1) In an action of account, such a particular description is not necessary. In the case cited from *Viner's Abridgment*, the description is as general as ours, and it was holden to be sufficient.

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But in the cases read, the gist of the action is property; in this, it is a neglect of duty. Not one of the reasons, which apply to actions of trover, apply to this case. The defendant, in this case, can come prepared to show, that he has not violated his duty; and this judgment will furnish a complete defence to a subsequent action. Besides, if such strictness is required, the infant will often be without any remedy against the judge; for it may be impossible for him to describe the property. The inventory may not specify it; for it may have come from a friend, or the administrator may have changed it.

Further, these records are all in the hands of the defendant; and as to him, at least, the maxim "*id certum est, quod certum reddi potest*," is applicable.

But whatever might have been the case, upon demurrer, the exception comes now too late. In the cases read, had the value been set forth, judgment would not have been arrested; but there was no rule of damages given. Had the defendant demurred to this declaration, it might have been amended; but after verdict, it is neither reasonable, nor rutable, to arrest the judgment, because the allegations in the declaration are too general. The decisions of this Court have gone very far in aiding even substantial defects; and it has been held,

(1) *Esp. Dig.* 587.

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that every fact should be presumed, which by any possibility could be supposed to exist. In the case of *Spencer v. Overton*, (m) notice, though not stated, was presumed to have been found. And, indeed, it is unreasonable, that the defendant after having led the plaintiff through a course of law, should, at last, be permitted to overturn the whole, by reason of some trifling defect.

2. The defendant, it is said, is a judge. Had he not been a judge, he could not have done us this injury. We never contended, that for a *mere mistake* in judging, the defendant was liable.—We admit, that neither judges, nor jurors, nor arbitrators, nor select men, are liable for a *mere error* in judgment. The same principle is applicable to all persons performing discretionary duties, as lawyers, administrators, sheriffs, and constables, when they exercise their discretion in a reasonable manner. But, in the present case, we do not complain of the defendant for misjudging.

The taking of bonds is not a judicial act. There may be some *discretion*, to be exercised in this duty, even by a sheriff; but there can be no difference, whether the bonds are taken by a sheriff, or judge, or justice. No appeal will lie; and if it were otherwise, in such a case as the present, the right of appeal would be of no use. The guardian would not take the appeal; and before the infant was of age, the property might all be squandered. Here was a *particular duty* assigned to the judge; and for refusing to perform it, whether it be called a judicial, or ministerial act, he must be liable. Suppose property had been attached, upon a suit returnable before a justice, and he should refuse to call the case; would he not

be liable? Suppose a court were to erase a case, or all the cases, from the docket, without a hearing; would they not be liable? Suppose, in a case, where execution is not to issue without bonds, it should, in a suit against the clerk, be alleged, that he *refused* to take bonds, *knowing the defendant to be a bankrupt*; would not the clerk be liable? Or, if that should be considered as the act of the Court, suppose he should enter up judgment, contrary to the decision of the Court; would he not then be liable?

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But according to the plain language of this declaration, *corruption* is alleged. It is stated, that the defendant appointed, a *known bankrupt* to be guardian, and *refused* to take *security*. It is objected, that malice is not alleged; but it is not necessary to allege and prove a particular malice and ill-will towards the infant. He might have acted, with a view to his own emolument, or to accommodate a friend. If a judge should appoint a prisoner from New-Gate guardian, and refuse to take bonds, would not this be corrupt? Any wrong act, which is done *wittingly* and *wilfully*, is done *corruptly*; for all idea of mistake is thus destroyed.

If malice must be stated, it is only implied malice; and in looking over this declaration, we see nothing but a heart destitute of social duties. But, in this case, the *quo animo* is no part of the enquiry, as the defendant *refused* to do, what the law expressly enjoined upon him.

Sound policy requires, that a judge, under such circumstances, should be liable; for if he may thus wilfully violate the law, he can never, on the principles contended for, be called to account. It is important to society, that judges should be supported in the due exercise of their

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powers ; but when they *wilfully* exceed them, they ought to be liable.

There is no difference between this case, and that of *Smith v. Thrall*, (n) decided in this Court, except that this is a stronger case, as that was on demurrer. Besides, the defendant, in that case, did not refuse to take bonds, but did in fact take bonds ; nor was there a fact stated to show, that he acted corruptly. The law makes it the duty of the justice to take bonds on a writ of replevin, and the duty of the Judge of Probate, on the appointment of a guardian. They are both judicial, or both ministerial acts. It is of the utmost consequence, that we should have an uniformity of decisions ; it is important to courts, important to counsel, and important to the people at large. And we trust, that that case will be regarded as an authority in this Court.

*Ingersoll*, in reply.

1. No authority can be shewn, to prove, that more certainty is requisite in actions of trover and trespass, than in the present ; and the reasons in those cases apply to every case. In the present case, the defendant might, perhaps, have proved, that part of the property was not squandered, had it been properly described. And it is important to him, that it be described, that he may plead it in bar to another action. And in those cases, as well as this, it is to be noticed, that the exceptions were taken after verdict.

But, it is said, that the loss of property is not the gist of the action. It will not, however, be pretended,

that the loss of property is unimportant; for if the defendant in error has lost nothing, by the want of bonds, the suit will not lie. In *Smith v. Thrall*, if the defendant had received all his money, the action would not have lain. This declaration, therefore, is bad, for being too general.

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2. If the appointment of the guardian was a mere ministerial act, there is not enough alleged, to support an action. No recovery can be had, unless there was corruption.

That *Phelps* acted as judge, is admitted. The statute constituting courts (o) will show, that their powers are judicial; for it is absurd to say, that a court shall consist of ministerial officers. A clerk to record ministerial acts would be absurd.

Are not the probate of wills, the granting of administration, &c. judicial acts? Is, then, the taking of bonds, accompanying those acts, ministerial?

It is said, an appeal cannot be taken. But the power of the judge is so limited, that there is no need of an appeal. If, however, there is a question, whether the infant is not of age to elect for himself, and the judge refuses to appoint the person he elects, undoubtedly an appeal may be taken.

If, then, he acted as judge, no action will lie, even though he acted corruptly. It may, indeed, be a hard case; but the judge is amenable to the public only, and not to individuals. Upon the principle contended for,

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no judge would be exempt; suits might be brought against the judges of the highest court. The legislature will, indeed, lend a ready ear to complaints against such officers; but their office must always protect them in suits brought by individuals. The County Court are to take bonds of taverners; but are they liable if they do not? No; it is done, by the Court, as part of the business of the Court. So this bond was taken, not by *Noah Phelps*, but by the *Court of Probate*.

It is agreed, that the defendant was not liable for misjudging. But, it is said, the declaration states enough to show, that he acted maliciously. But malice can never be *inferred*, by a court. In slander, malice and falsehood must be stated; and here, corruption must be averred. The jury may infer it, from the facts proved; but the court can never make that inference.

The declaration, indeed, states, that the plaintiff had so much property, and the judge knew it, and appointed *Stanley* guardian, who was a known bankrupt; but there is no averment, that *Stanley* was not an *honest man*. No corruption, therefore, could be inferred, even were it the duty of the court to make the inference.

What is *sufficient* security, is a mere question of construction. The judge might well say, if the intended guardian was responsible, "I may take his own bond," or, if he was a bankrupt, "I know him to be honest, and capable of doing the business; the law gives me a discretion, with respect to the sufficiency of the security; I would trust him with my own property; I may, therefore, trust him with that of others." Can the court, then, infer malice in the judge?

But, it is said, in this case, *no security* was taken. If I had a debt against a bankrupt, and should say, I had no security, this would not exclude the idea of my having his note. In this case, therefore, though it is averred, that *no security* was taken, it does not follow, that the bonds of the guardian were not taken.

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The case has been put of a judge's refusing to appoint a guardian, or try a cause. To this it may be answered, that he may be impeached, or displaced ; but cannot be subjected to damages, in a private suit.

If, then, this case stood upon a demurrer, there could be no doubt. But, it is said, that by the decisions of this Court, the defect cannot be taken advantage of after verdict. In the case referred to, the Court went upon the idea, that the plaintiffs, having grounded their action upon a promise in law, to support which notice was necessary, and the jury having found the promise, must necessarily have found the fact of notice. The rule is, that what is defectively set forth is cured by verdict ; but here malice is not stated at all : the malice must be found, whether the act was ministerial, or judicial. Were all the facts stated in a special verdict, the Court could no more infer malice, than they could infer a conversion, in an action of trover, if a special verdict, stating a demand and refusal, had been found.

In *Smith v. Thrall*, the justice did not act as a judge, nor did he do a judicial act ; he made no record, and had no clerk. There, the Court went further than English authorities will warrant ; but, from the report, of that case, it does not appear, that the Court took into consideration the question, whether the defendant acted as a judge.

1804.

The judgment was reversed.

PHELEPS

v.

SILL.

BY THE COURT. In the opinion of this Court, the declaration is insufficient. It is uncertain ; and the facts therein stated furnish no ground of action against the defendant.

1. The declaration is uncertain. The averment is, that the plaintiff possessed personal estate of the value of two thousand dollars. It is, in this particular, altogether general, without specifying the personal estate intended. A more particular description of the estate is essential, as means of information to the defendant, for his defence. To a claim so loose, he cannot be presumed to be able to answer. It also is essential to a recovery, and for a rule of damages. That the plaintiff was possessed of personal estate, and had lost it by means of the defendant's conduct, is the gist of the action. He must, then, identify the species of estate, which he claims to have owned. The rule, in this respect, is, that the declaration must be certain ; and although the minuteness formerly insisted on is not now required, yet no case is found, in analogous actions, where a declaration so loose as the present, in respect to the estate made the foundation of the claim, has been supported, either before, or after, verdict. But many occur, where the declarations were less general, which have, notwithstanding, been dismissed, on the ground of their being too general, both on demurrer, and after verdict.

2. The facts stated furnish no cause of action against the defendant. The facts respect the defendant's conduct as Judge of Probate ; as such, he is charged with appointing a bankrupt guardian ; and with neglecting and refusing to take security from the guardian, as by



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law is required ; and with not calling the guardian to account for the plaintiff's estate, no impurity of motive is imputed to him, and none is to be inferred.

By these charges the defendant is no otherwise implicated, than for error of judgment, in doing an act, or in neglecting and refusing to do a particular official act, in the exercise of judicial power ; and it is a settled principle, that for those a judge is not to be questioned in a civil suit. A regard to this maxim is essential to the administration of justice. If by any mistake in the exercise of his office, a judge should injure an individual, hard would be his condition, if he were to be responsible therefore in damages. The rules and principles, which govern in the exercise of judicial power, are not, in all cases, obvious ; they are often complex, and appear under different aspects to different persons. No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man, whom his decisions might offend. It is, therefore, a settled principle, that however erroneous his judgment may be, either by positive acts, neglect, or refusal to do certain acts, or however injurious to a suitors, a judge is never liable, in any civil action, for damages arising from his mistake.

## REGULÆ GENERALES.

*Supreme Court of Errors, June Term, 1804.*

Errors to be specially assigned.

**R**ULED, That this Court will not, after the present session, hear argument on any matter of error, unless the same shall have been specially assigned, in the writ of error.

Service, where not prescribed by law, to be made, by leaving a copy, or by publishing notice in two or more public newspapers.

**R**ULED, That the service of a writ, returnable to this Court, on such defendant, or defendants, named therein, where such service is not prescribed by law, will be deemed sufficient, where it shall appear, that the original writ, or a *scire-facias*, describing the substance of the action, signed by a Judge of the Court, or a copy of such original writ, or *scire-facias*, has been left at his, or their, usual place of abode, respectively, at least twelve days, before the sitting of the Court, to which the same is returnable. And such service shall be evidenced by the return of the person, or officer, serving the same, indorsed on the writ, or *scire-facias*, and his affidavit to the truth of such return, made before, and certified by, a magistrate, judge, or justice of the peace. And, in case the place of abode of such defendant, or defendants, cannot be known, or discovered, or shall be without the limits of the United States, notice to appear, describing the action, and signed by a Judge of the Court, being published in two or more public newspapers, within this State, three weeks successively, at least six weeks before the sitting of the Court, will be deemed sufficient service, subject, however, to such further order, as the special circumstances of the case, in the opinion of the Court, may require.

AN

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OF THE

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3. A person is not a competent witness to impeach a writing, which he has subscribed. *ib.*
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1. An officer having an opportunity to levy an execution in his hands on the body or property of the debtor, is liable to the creditor, if he neglects to levy. *Frost v. Dargel.* 128

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## EXECUTOR AND ADMINISTRATOR.

1. Action of trespass for entering upon the lands and burning the mills of the intestate, survives to the administrator. *Griswold v. Brown.* 180

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## F

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An agreement entered into between husband and wife, during coverture, is void, and cannot be enforced in chancery against the executor of the husband. *Dibble v. Hutton.* 221

### FORGERY.

A person injured by a forged note, though the note was not forged in his name, may have an action on the statute for the forgery. *Ross v. Bruce.* 100

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An act of insolvency, by the legislature of this State, discharging the insolvent from all his debts, may be pleaded in bar of an action on a contract entered into in another

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## J

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  2. A finding of facts by the Court in these words, "*the Court are of opinion*," &c. is a good finding. *Todd v. Potter*. 238
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M

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MORTGAGE.

1. An execution may be levied upon an equity of redemption as real estate, and the creditor, after having the same appraised and set off to him under the statute, acquires all the rights of the mortgagor in the premises. The mortgagor cannot afterwards redeem. *Punderson v. Brown.* 93
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N

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not the whole; B. conveys the land to C. upon a contract that C. should reconvey the same, before the time of drawing; A. with notice of that conveyance, enters into a contract with C. the object of which is to save C. upon certain conditions, from the obligation of reconveying to B. C. though he fails to perform the conditions of his contract with A. neglects to reconvey to B. and B. *neglects to draw*;—held that A. is not entitled to relief in chancery against the notes. *Lloyd v. Bull*. 173

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2. Service, where not prescribed by law, to be made by leaving a copy, or by publishing notice in two or

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An action of trover cannot be sustained by one tenant in common against

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## WRIT OF ERROR.

1. The Court will not erase a writ of error from the docket, which has no date, but was served in October, and returnable in June then next. *Ogden v. Lyman.* 34
2. On plaintiff's withdrawing such writ, defendant may enter for costs, but no damages will be assessed in his favour. *ib.*

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